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Dole v. Dow Chemical Co.: A Revolution in New York Law

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In *1405 Realty Corp. v. Napier*,[210] a process server visited the defendants' apartment twice, but failed to personally serve them. He then resorted to RPAPL 735's alternative method of service. Since the requirements of this section had been complied with, a judgment for possession was granted. However, the judgment did not include accrued rent, since the place of service requirements of CPLR 308(4) had not been met.[211] The court emphasized that, as to the places where service is to be made under CPLR 308(4) and RPAPL 735, there is "a difference of substance, not a mere semantical distinction."[212] It noted: "The former requirement is calculated to acquire jurisdiction of the person; the latter seeks only jurisdiction of the res."[213]

Developments in New York Practice

Dole v. Dow Chemical Co.: *A Revolution in New York Law*

Introduction

In *Dole v. Dow Chemical Co.*,[1] the New York Court of Appeals recently recognized the right of one charged solely with active negligence to obtain indemnification from other persons sharing responsibility for the plaintiff's damages. Liability is now to be apportioned among the several tortfeasors, on the basis of the "relative responsibility" of each.[2] Prior to *Dole*, the right to indemnification was limited to situations where a passive tortfeasor sought recovery over from an active tortfeasor. Additionally, CPLR 1401 allowed contribution where a joint tortfeasor paid more than his pro rata share of a joint judgment.

The following example illustrates the operation of this rule of apportionment. *X*, while on the premises of *Y*, was injured due to a dangerous condition created by the negligence of *Z*. *Y*, who was aware of the danger, permitted *X* to enter the premises anyway. Prior to *Dole*, if *Y* were sued individually, he would bear the entire loss, with no recourse against *Z* for *X*'s injuries.[3] However, *Dole* vests in *Y* the right either to implead *Z* or to institute a separate action against *Z*, and thus be indemnified for that portion of the plaintiff's recovery attributable to *Z*'s negligence.

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210 68 Misc. 2d 793, 328 N.Y.S.2d 44 (N.Y.C. Civ. Ct. Bronx County 1971).

211 *Id.* at 795, 328 N.Y.S.2d at 46.

212 *Id.*

213 *Id.*

1 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972).

2 *Id.* at 153, 282 N.E.2d at 295, 331 N.Y.S.2d at 392.

3 "[F]ailure to act after actual knowledge of the existence of the dangerous condition . . . spells out active negligence." Central Hudson Gas & Elec. Corp. v. Costanzi, 140 N.Y.S.2d 185, 188 (Sup. Ct. Westchester County 1955).

Importantly, the *Dole* case is a strong indication of judicial dissatisfaction with the doctrine of contributory negligence, which requires that a plaintiff be completely free from fault in order to recover.[4] The adoption of comparative negligence among defendants is part of a trend toward the adoption of full comparative negligence in New York.

Historical Background

An understanding of the concepts of contribution and indemnity is necessary to appreciate fully the impact of *Dole v. Dow Chemical Co.* These concepts are based on "equitable considerations of unjust enrichment and restitution."[5] Contribution involves an equal sharing of liability between two or more persons who jointly cause damage. Each wrongdoer is required to pay his pro rata share in a distribution of the loss among all tortfeasors.[6] Indemnity involves a total shifting of liability from one tortfeasor to another who should bear the entire liability imposed.[7] Indemnity arises by operation of law where one party is primarily responsible for the injury,[8] and contribution applies in those instances where the parties are in pari delicto.[9]

Merryweather v. Nixan,[10] is the progenitor of the rule denying contribution between joint tortfeasors.[11] A joint judgment had been

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4 *See* Fitzpatrick v. International Ry., 252 N.Y. 127, 134, 169 N.E. 112, 115 (1929).

5 Note, *Contribution and Indemnity in California*, 57 CALIF. L. REV. 490, 491 (1969) [hereinafter *Contribution and Indemnity in California*].

6 *See* W. PROSSER, THE LAW OF TORTS 310 (4th ed. 1971) [hereinafter PROSSER]; Leflar, *Contribution and Indemnity Between Tortfeasors*, 81 U. PA. L. REV. 130 (1932) [hereinafter Leflar].

7 *See* PROSSER, *supra* note 6, at 310; Leflar, *supra* note 6, at 131.

> There are two important practical distinctions between indemnity and contribution. In the case of indemnity there is a complete reimbursement; contribution among joint tort-feasors is on a pro rata basis. Second, in an indemnity situation, impleader and cross-claims are appropriate whereas the contrary is true in the case of contribution.

2A WK&M ¶ 1401.03.

8 *See* PROSSER 310-13; Leflar at 146.

9 *See* 2A WK&M ¶ 1401.03. The determination as to which remedy—indemnity or contribution—is appropriate is difficult in certain situations.

> [T]he line between indemnity and contribution has become blurred when there is some element of fault on the part of both defendants but the distribution of fault is disproportionate, such as in cases involving tortfeasors one of whom is guilty of "active" negligence and the other only of "passive" negligence.

Id.

10 101 Eng. Rep. 1337 (K.B. 1799).

11 *Merryweather* has been criticized so extensively and so many exceptions have evolved that one commentator concluded:

> It is singularly unfortunate, and has led to misunderstanding, that Merryweather v. Nixan should have been continually treated as stating the "general rule." As a matter of fact that case states not the rule, but the exception.

Reath, *Contribution Between Persons Jointly Charged For Negligence*—Merryweather v. Nixan, 12 HARV. L. REV. 176, 177 (1898) [hereinafter *Contribution*—Merryweather v. Nixan]. *See also* RESTATEMENT OF RESTITUTION, Introductory Note §§ 86-102 (1937).

entered against two defendants and had been satisfied by one, who sought contribution from the other. Due to the lack of judicial precedent for allowing contribution, Chief Justice Kenyon held that the plaintiff was not entitled to recover. An essential element of *Merryweather* was the fact that the conduct of the parties was intentional and concerted.[12] It has been argued that the rule espoused should not be taken beyond the context of those particular facts.[13] In refusing to award contribution, the *Merryweather* court completely abrogated the more fundamental right that losses should be distributed among those whose conduct was the source of wrongdoing.[14]

Later English cases clarified the rule, holding it inapplicable in situations of "mere vicarious liability, negligence, accident, mistake, or other unintentional breaches of the law."[15] When the rule against contribution was adopted in the United States, it was applied initially only to intentional or wilful conduct.[16] Eventually, the courts extended the rule to cases involving negligent tortfeasors.[17]

Justification for the rule against contribution is primarily explained in terms of deterrence to wrongful actions and punishment for misconduct.[18] Adhering to the "unclean hands" doctrine, courts avoided

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12 *See* PROSSER 305; Bohlen, *Contribution and Indemnity Between Tortfeasors*, 21 CORNELL L.Q. 552, 555 (1936) [hereinafter Bohlen]; Leflar at 130. The judgment was for damage to a reversionary interest in a mill and for trover to machinery.

> The ground of the decision would appear to have been simply the fact that the parties had acted intentionally and in concert, and the plaintiff's claim for contribution rested upon what was, in the eyes of the law, entirely his own deliberate wrong.

PROSSER 305.

13 *See, e.g.*, Bohlen, *supra* note 12, at 550-60; Davis, *Indemnity Between Negligent Tortfeasors: A Proposed Rationale*, 37 IOWA L. REV. 517, 537 (1952) [hereinafter Davis]; Leflar at 140-46; *Contribution*-Merryweather v. Nixan, *supra* note 11, at 180; Note, *Toward a Workable Rule of Contribution in the Federal Courts*, 65 COLUM. L. REV. 123, 124 (1965) [hereinafter *A Workable Rule of Contribution*].

> Today Lord Kenyon's decision seems highly unfortunate. The profession . . . [has] come to realize that the primary if not the sole function of a tort action is to place the burden of bearing the loss caused by tortious conduct upon those who *should* bear it.

Bohlen at 556.

14 *See* Keeton, *Comment on* Maki v. Frelk, 21 VAND. L. REV. 906, 913 (1968).

15 PROSSER 306. *See* Palmer v. Wick & Pulteneytown S.S. Co., [1894] A.C. 318 (Scot.); Burrows v. Rhodes, 1 Q.B. 816 (1899); Adamson v. Jarvis, 130 Eng. Rep. 693 (C.P. 1827); 1 F. HARPER & F. JAMES, THE LAW OF TORTS 715 (1956) [hereinafter HARPER & JAMES]. England abolished the *Merryweather* rule by the Law Reform (Married Women and Tortfeasors) Act of 1935, 25 & 26 Geo. 5, c. 30, § 6.

16 PROSSER 306, *citing* Hunt v. Lane, 9 Ind. 248 (1857); Miller v. Fenton, 11 Paige 18 (N.Y. 1844); Peck v. Ellis, 2 Johns. Ch. 131 (N.Y. 1816); Rhea v. White, 3 Head 121 (Tenn. 1859); Atkins v. Johnson, 43 Vt. 78 (1870).

17 *See* 1 HARPER & JAMES, *supra* note 15, at 715; Davis, *supra* note 13, at 517; *Contribution and Indemnity in California*, *supra* note 5, at 494. This blanket application took place in the twentieth century.

18 *See* Bohlen at 557; Leflar at 133; *A Workable Rule of Contribution*, *supra* note 13,

"disputes about transactions which flout[ed] the very law which the courts [were] asked to administer."[19] While this policy may be valid insofar as wilful wrongs are concerned, its viability is highly questionable insofar as it purports to deter negligence.[20] While a fundamental aspect of our law involves a "refusal to aid wrongdoers," distribution of losses among wrongdoers in accordance with a policy against allowing a wrongdoer to escape responsibility is equally compelling.[21] Additionally, the common-law rule against contribution can be criticized for its delegation to plaintiffs of an absolute right to select their defendants.[22] Fortunately, most jurisdictions have altered the common-law rule, through statute or decisional law, and there is increasing support for free allocation of losses among all wrongdoers.[23]

Due to strict application of the rule denying contribution, a means was developed to shift the entire liability from one person to another where the qualities of negligence differed — indemnity.[24] It is clear that the constant disallowance of contribution caused indemnity to be "overextended as a device for reallocating loss"[25] and applied where contribution would have been the more appropriate remedy.[26] One author has divided indemnity cases into three categories. The "liability without fault" category encompasses cases where liability results from

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at 124; Note, *Adjusting Losses Among Joint Tortfeasors in Vehicular Collision Cases*, 68 YALE L.J. 964 n.1 (1959).

> The reason why the law refused its aid to enforce contribution amongst wrongdoers, is that they may be intimidated from committing the wrong, by the danger of each being made responsible for all the consequences; a reason, which does not apply to torts or injuries arising from mistakes or accidents, or involuntary omissions in the discharge of official duties.

Thweatt's Adm'r v. Jones, 1 Rand. 328, 333 (Va. 1823).

19 Leflar at 134. *See* Bohlen at 557; *A Workable Rule of Contribution* at 124.

20 *See* Bohlen at 557-59; Leflar at 134.

21 *See* Keeton, *Creative Continuity in the Law of Torts*, 75 HARV. L. REV. 463, 480 (1962) [hereinafter *Creative Continuity*]. In actuality, refusing contribution to joint tortfeasors may encourage wrongdoing. Habitual wrongdoers might be willing to take the risk of being completely liable against the possibility of avoiding all liability.

22 *See* Bohlen at 553; Leflar at 137; *A Workable Rule of Contribution* at 125. In Pennsylvania Co. v. West Penn Rys., 110 Ohio St. 516, 144 N.E. 51 (1924), the plaintiff brought an action for contribution after a joint judgment had been rendered against him and a third party. The defendant, who owned stock of the third party, became assignee of all the claims and proceeded to enforce the claims against the plaintiff only.

23 For the most comprehensive listing of the alterations of the common-law rule by the states, see Note, *Adjusting Losses Among Joint Tortfeasors in Vehicular Collision Cases*, 68 YALE L.J. 964, 981-84 (1959), which is divided into three general sections: (1) where contribution is allowed and under what conditions; (2) where idemnity is permissible and under what circumstances; and (3) where indemnity is permitted and denied in collision cases.

24 *See A Workable Rule of Contribution* at 126.

25 *Id.*

26 *See* Bohlen at 568. In Slattery v. Marra Bros., 186 F.2d 134, 138 (2d Cir. 1951), Judge Learned Hand stated: "Indemnity is only an extreme form of contribution."

imputation of law, *e.g.*, *respondeat superior* cases, and the "liability with negligible fault" category includes cases where there is a non-delegable duty, *e.g.*, a failure to remedy a danger caused by another. The third category, "liability with lesser fault," encompasses cases predicated on the fault of both parties, but allows a shifting of the entire loss on the basis of varying degrees of culpability.[27] The concept of indemnity is more readily understandable in this light.

The Development of Contribution and Indemnity in New York

The issue of contribution first arose in New York in 1816. In *Peck v. Ellis*,[28] the *Merryweather* rule was adopted as contribution was denied to one of two joint tortfeasors who had fraudulently induced his victim into illegally cutting and carrying off timber. Chancellor Kent expressed doubt that equity would aid one tortfeasor against another if their liability was equal and concluded that it certainly would not do so when the party seeking its aid was personally guilty and the other was only technically or constructively so.[29]

Peck did not deviate from *Merryweather* in its holding, as the tort in question was wilfully committed. Subsequent decisions also applied the rule only to those offenses intentionally perpetrated,[30] thus paralleling the development of the *Merryweather* rule in England.[31] In 1861, however, the rule against contribution was extended to include conduct which was merely negligent rather than intentional,[32] and this addition to the common-law rule became fixed in New York law.

The expanded *Merryweather* rule remained settled law in New

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27 *Contribution and Indemnity in California* at 494-99.

28 2 Johns. Ch. 131 (N.Y. 1816).

29 *Id.* at 136. The Court recognized that both parties were guilty of fraud but that there was all possible difference in the demerit of each, and in the nature and degree of the fraud imputable to both. The fraud in Rowland was legal or constructive fraud; but in Ellis it was actual fraud. . . .

Id. at 135. This distinction was gratuitously drawn as the constructively guilty party was not seeking recovery through contribution. He did, however, obtain an express contract of indemnity with the actually guilty party to guard against the consequences of any possible fraud. The Chancellor's statement can be read as sowing the seeds of the concept of the relative degree of liability between joint tortfeasors as a proper consideration in the granting of indemnification.

30 *See* Miller v. Fenton, 11 Paige 18 (N.Y. 1844) (intentional fraud); Pierson v. Thompson, 1 Edw. Ch. 212 (N.Y. Vice-Ch. Ct. 1831) (knowing trespass).

31 *See, e.g.*, Betts v. Gibbons, 111 Eng. Rep. 22 (K.B. 1833); Adamson v. Jarvis, 130 Eng. Rep. 693 (C.P. 1827). These cases restated the rule as applicable only to intentional conduct.

32 Andrews v. Murray, 33 Barb. 354 (N.Y. Sup. Ct. 1861). The court apparently misread an earlier English case, Pearson v. Skelton, 150 Eng. Rep. 533 (Ex. 1836), which it cited in support of this extension. *Pearson* was indeed a negligence case, but the court therein had clearly limited the application of *Merryweather* to intentionally committed wrongs.

York until its statutory modification in 1928. In an effort to ameliorate the harsh effects of the rule,[33] the Legislature enacted section 211-a of the Civil Practice Act,[34] which provided a limited right of contribution between joint tortfeasors and prescribed procedural methods for obtaining such relief. A defendant could proceed immediately against a co-defendant or institute a separate action later. Two prerequisites were required under the statute: (1) a joint judgment against two or more parties, and (2) the discharge by one of more than his pro rata share of the judgment.[35]

The possibility of contribution was thus wholly dependent upon the plaintiff's inclusion of other joint tortfeasors in the action.[36] Attempts to circumvent this requirement soon focused on the impleader provisions of section 193(2) of the CPA.[37] If other co-tortfeasors could

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[33] *See* Epstein v. National Transp. Co., 287 N.Y. 456, 458, 40 N.E.2d 632 (1942); Note, *Contribution Between Joint Tortfeasors*, 24 ST. JOHN'S L. REV. 276 (1950).

While the rule applied only to parties who were actually *in pari delicto* (*see* Security Mut. Cas. Co. v. American Ice Co., 268 App. Div. 924, 51 N.Y.S.2d 299 (2d Dep't 1944) (mem.)), as opposed to those whose "misconduct" was technical or constructive, the extension of the rule to encompass negligently committed torts opened the gates to harsh, inequitable decisions. *See* N.Y. LAW REVISION COMM'N REP. 707 (1936) [hereinafter 1936 REP.]. England abolished the rule in 1935. *See* note 15 *supra*.

[34] The New York statute, CPA 211-a, added by L. 1928, ch. 714, read:

> Action by one joint tort-feasor against another. Where a money judgment has been recovered jointly against two or more defendants in an action for a personal injury or for property damage, and such judgment had been paid in part or in full by one or more of such defendants, each defendant who has paid more than his own pro rata share shall be entitled to contribution from the other defendants with respect to the excess so paid over and above the pro rata share of the defendant or defendants making such payments; provided, however, that no defendant shall be compelled to pay to any other such defendant an amount greater than his pro rata share of the entire judgment. Such recovery may be had in a separate action; or where the parties have appeared in the original action, a judgment may be entered by one such defendant against the other by motion on notice.

For an excellent treatment of CPA 211-a, see Note, *Contribution Between Joint Tortfeasors*, 24 ST. JOHN'S L. REV. 276 (1950).

[35] *See* Putvin v. Buffalo Elec. Co., 5 N.Y.2d 447, 454, 158 N.E.2d 691, 695, 186 N.Y.S.2d 15, 20 (1959); Fox v. Western N.Y. Motor Lines, Inc., 257 N.Y. 305, 308, 178 N.E. 289, 290 (1931).

[36] The New York courts consistently nullified attempts by defendants to insure joint judgments by denying the availability of various appellate remedies. *See* Ward v. Iroquois Gas Corp., 258 N.Y. 124, 179 N.E. 317 (1932) (defendant who had not paid joint judgment had no standing to contest reversal of judgment as to co-defendant); Price v. Ryan, 255 N.Y. 16, 173 N.E. 907 (1930) (defendant had no standing to appeal from a verdict in favor of co-defendant). A defendant also had no standing to move to have a verdict in favor of a co-defendant set aside. *See* Hughes v. Parkhurst, 284 App. Div. 757, 134 N.Y.S.2d 798 (4th Dep't 1954). CPLR 1402(a), a codification of Epstein v. National Transp. Co., 287 N.Y. 456, 40 N.E.2d 632 (1942), allows a tortfeasor who has paid a joint judgment to oppose an appeal taken by a co-defendant and to prosecute an appeal from any reversal or modification. *See* 2A WK&M ¶ 1402.03. In light of *Dole*, the continued validity of the rule denying a tortfeasor standing to appeal a dismissal as to a co-defendant is doubtful.

[37] Prior to 1946, section 193(2) of the CPA provided:

> Where any party to an action shows another party or parties thereto is or are, or will be, liable to such moving party wholly or in part for the claim made against

be impleaded into the action by the defendant, the risk of relying on the plaintiff's choice of election could be eliminated.[38] This avenue of

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such moving party in the action, the court, on application of such moving party, may order a pleading alleging the claim of such moving party against such other party or parties to be served upon such other party or parties and that such other party or parties plead thereto, so that the claim of such moving party against such other party or parties may be determined in such action, which shall thereupon proceed against such other party or parties as a defendant or defendants therein to such judgment as may be proper.

Third-party practice in New York originated in 1922 with the passage of a statute which, as amended in 1923, was contained in section 193(2) of the CPA. The statute closely patterned English impleader practice, as authorized by Order XVI of the Rules of the Supreme Court (1875), in an effort to eliminate the time, expense, and repetition of multiple litigation. *See* Baxter v. France, 1 Q.B. 59 (1895).

Section 193(2) was unsatisfactory for several reasons: (1) leave of the court was required for the defendant to implead; (2) the plaintiff was allowed to object to the impleader before and after the inclusion of a third party; (3) impleader was only permitted if the third party was or would be liable to the defendant, causing the courts to be illiberal by requiring identity of claims; and (4) the third party could not interpose defenses against the main plaintiff's claim. *See* 7B McKINNEY'S CPLR 1007, commentary at 334-35 (1963).

Correcting these defects, the Legislature in 1946 re-enacted the statute as section 193-a of the CPA, which provided in part:

After the service of his answer, a defendant may bring in a person not a party to the action, who is or may be liable to him for all or part of the plaintiff's claim against him, by serving upon such person a summons and copy of a verified complaint. The claim against such person, hereinafter called the third-party defendant, must be related to the main action by a question of law or fact common to both controversies, but need not rest upon the same cause of action or the same ground as the claim asserted against the third-party plaintiff.

CPLR 1007, the present counterpart of CPA 193-a, remained largely unchanged from its predecessor. *See* 7B McKINNEY'S CPLR 1007, commentary at 333 (1963). CPLR 1007 reads as follows:

When third-party practice allowed. After the service of his answer, a defendant may proceed against a person not a party who is or may be liable to him for all or part of the plaintiff's claim against him, by serving upon such person a summons and third-party complaint and all prior pleadings served in the action. A defendant serving a third-party complaint shall be styled a third-party plaintiff and the person so served shall be styled a third-party defendant. The defendant shall also serve a copy of such third-party complaint upon the plaintiff's attorney.

[38] This tactic produced mixed results. Defendants were permitted to implead co-tortfeasors in Schenck v. Bradshaw, 233 App. Div. 171, 251 N.Y.S. 316 (3d Dep't 1931); Davis v. Hauk & Schmidt, Inc., 232 App. Div. 556, 250 N.Y.S. 537 (1st Dep't 1931); Haines v. Bero Eng'r Constr. Corp., 230 App. Div. 332, 243 N.Y.S. 657 (4th Dep't 1930). Illustrative of the rationale utilized by the courts to allow impleader is the following:

We are to say what weight is to be given to this consideration where application is made under section 193, subsection 2 of the [CPA]. Since that section was left untouched when section 211-a of the [CPA] was enacted, there is no further express encroachment on the established right of a plaintiff with reference to the joinder of defendants. . . . The statute [section 211-a] grants a substantial right. It was not intended, we think, that the opportunity of a defendant to utilize that right should depend solely upon the will of a plaintiff; nor should the courts thwart the legislative purpose by a narrow interpretation of a practice rule nor by the use of a discretion too restricted in scope.

Haines v. Bero Eng'r Constr. Corp., 230 App. Div. 332, 334-35, 243 N.Y.S. 657, 661 (4th Dep't 1930).

Other courts, however, refused to allow impleader: Troshow v. B. Altman & Co., 140 Misc. 420, 250 N.Y.S. 599 (Sup. Ct. N.Y. County 1931); Rowe v. Denler, 135 Misc. 286, 238 N.Y.S. 9 (Sup. Ct. Erie County 1929); Rothman v. Byron, 141 Misc. 770, 253 N.Y.S. 812

approach, however, was closed by the Court of Appeals in *Fox v. Western New York Motor Lines, Inc.*[39] The plaintiff therein, a passenger in a truck, was injured in a collision with an omnibus owned by the defendant corporation. When the plaintiff did not join the driver of the truck, the defendant sought to implead him under section 193(2) so as to secure contribution. The Court held that the impleader provision could not be applied concurrently with section 211-a to permit a defendant to implead a co-tortfeasor in order to secure the joint judgment necessary to obtain contribution.[40] The Court ignored the mandate of the CPA to the contrary[41] and strictly construed the right to contribution granted by section 211-a. Subsequent application of section 211-a by the lower courts was consistent with the strict construction rationale of *Fox*.[42]

Clearly more equitable to a defendant than the common-law rule, section 211-a, nevertheless, was subject to extensive criticism as not being completely equitable, in that the right of contribution was entirely contingent upon the plaintiff's election to join joint tortfeasors.

(Westchester County Ct. 1931). Illustrative of the rationale utilized by the courts to deny impleader is the following:

> Under the common law a person injured by the joint negligence of two or more wrongdoers had the unqualified right to decide for himself whether he would sue one or all of the said wrongdoers. . . . Unquestionably the Legislature has modified this common law doctrine. But the Legislature has expressly and clearly stated the extent of this modification and the circumstances under which it is to become effective. . . . Did the Legislature intend to go further? A statute in derogation of the common law must be strictly construed.

Rothman v. Byron, 141 Misc. 770, 772, 253 N.Y.S. 812, 815 (Westchester County Ct. 1931).

[39] 257 N.Y. 305, 178 N.E. 289 (1931).

[40] *Id.* at 308, 178 N.E. at 290. The Court said in pertinent part:

> Section 211-a has in no way modified or extended section 193, subdivision 2, of the Civil Practice Act, or the limitations placed upon it by the courts. The practice under the latter section is the same now as it has been since 1923. Section 211-a sought to remedy one glaring defect in the law. Where a judgment had been recovered against two joint tort feasors, the payment by one relieved the other of all liability, either to the plaintiff or to the paying defendant. This was changed by requiring the joint defendant to pay his share of the judgment. This is the only change that has been made. A plaintiff may now sue as many defendants as he pleases whom he thinks may be liable in negligence for his damages. The Legislature has not yet given this same choice to the defendants to bring in other parties, whom they think should be liable either in place of or jointly with those whom the plaintiff has selected. If section 193 is to be extended, it must be by act of the Legislature and not by the fiat of the courts.

Id. at 308-09, 178 N.E. at 290.

Impleader was also unavailable to joint tortfeasors in England for this purpose. *See* Howell v. London Omnibus Co., 2 Ex. D. 365 (1877).

[41] Section 3 of the CPA stated: "The rule of the common law that a statute in derogation of the common law is strictly construed does not apply to this act." *See generally* Annot., *Constitutionality, Construction, and Effect of Statutes Relating to Exceptions to Rule Denying Contribution or Indemnity Between Joint Tortfeasors*, 141 A.L.R. 1207 (1942).

[42] Booth v. Carleton Co., 236 App. Div. 296, 258 N.Y.S. 159 (1st Dep't 1932); Tauro v. Queens-Nassau Transit Lines, Inc., 168 Misc. 879, 6 N.Y.S.2d 176 (Sup. Ct. Kings County 1938); Morbito v. Rupp, 143 Misc. 385, 256 N.Y.S. 605 (Sup. Ct. Erie County 1932).

The result was a disparity of treatment between "two or more persons whose conduct was indistinguishable from the viewpoint of fault."[43] The major fault of the statute was summarized in these terms:

> This statute requiring joint judgment liability as the necessary common obligation is unfortunate, not only because it fails to conform to customary notions of contribution generally, but also because it makes contribution available only at the whim of the injured plaintiff. . . . That contribution, a remedy obviously for the benefit of defendants and of no interest whatsoever to the injured plaintiff, should be left in this status is absurd.[44]

The Law Revision Commission was the principal critic of section 211-a and repeatedly attempted to secure its amendment.[45] In 1936, a study by the Commission found the following problems with practice under 211-a:

> Section 211-a, as interpreted by the Court of Appeals, has failed to remove the inequities resulting from the harsh rule of the common law. The New York law as it now stands makes the right of contribution among joint tortfeasors dependent not on their relative merits or demerits, but upon the chance that the injured person elects to sue in a single action more than one of them, and the further chance that joint judgment is rendered.[46]

At that time, the Commission urged that the right to contribution (1) should remain available whether the conduct alleged in the complaint was intentional or negligent, and (2) should not depend upon a joint judgment. The Commission opposed specific statutory prescriptions as to procedure on the ground that the courts should be free to deal with unforeseeable situations as they arose.

CPLR 1401,[47] the present contribution provision, is essentially the

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43 1936 REP., *supra* note 33, at 704.

44 Gregory, *Tort Contribution Practice in New York*, 20 CORNELL L.Q. 269, 271 (1935). The writer evaluates section 211-a in light of decisional law, compares it to Wisconsin practice, and concludes that a statute creating tort contribution without the requirement of joint judgment is a necessity. *See also* Gregory, *Procedural Aspects of Securing Tort Contribution in the Injured Plaintiff's Action*, 47 HARV. L. REV. 209 (1933).

45 *See* N.Y. LAW REVISION COMM'N REP. 21-73 (1952) [hereinafter 1952 REP.]; *id.* 29-35 (1941); *id.* 27-58 (1939); *id.* 65-88 (1938); *id.* 67-81 (1937); *id.* 699 (1936).

46 1936 REP. 704. Among the practical problems which arose under the statute were: (1) the unavailability of the names of all joint tortfeasors at the commencement of actions; (2) the hesitance of plaintiffs to sue citizens of foreign states; and (3) the fact that a joint judgment "tend[ed] to discourage a settlement by one of several tortfeasors since he would thereby lose his right to contribution." *Id.* 706.

47 CPLR 1401 reads as follows:

Action by one joint tort-feasor against another. Where a money judgment has been recovered jointly against defendants in an action for a personal injury or for property damage, each defendant who has paid more than his pro rata share shall be entitled to contribution from the other defendants with respect to the excess paid over and above his pro rata share; provided, however, that no defendant shall

same as CPA 211-a. Despite extensive criticism of 211-a, the Advisory Committee on Practice and Procedure recommended that no change be made in view of the provision's impact on substantive rights.[48] Furthermore, the Court of Appeals, in *Baidach v. Togut*,[49] had recently affirmed the strict construction rationale laid down in *Fox v. Western New York Motor Lines, Inc.*

With availability of contribution from unjoined tortfeasors foreclosed by *Fox*, defendants were compelled to look elsewhere to circumvent the plaintiff's right of election. Under section 193-a, a defendant could implead a party who was obliged to indemnify him. Since section 211-a did not change the rules of indemnity,[50] practitioners looked to indemnity to secure relief for defendants.[51]

In contrast to contribution, the right to indemnification is created by contract, either express or implied-in-law.[52] Under the implied-in-law category, which encompasses the relationship arising from the commission of a joint tort, New York has traditionally denied indemnity when the parties are *in pari delicto*.[53]

Joint tortfeasors have been considered *in pari delicto* when the

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be compelled to pay any other such defendant an amount greater than his own pro rata share of the entire judgment. Recovery may be had in a separate action, or a judgment in the original action against a defendant who has appeared may be entered on motion made on notice in the original action.

48 *See* FINAL REP. A-167 (Advance Draft 1961); FOURTH REP. 61.

49 7 N.Y.2d 128, 131, 196 N.Y.S.2d 67, 70, 164 N.E.2d 373, 376 (1959). The Court noted that before the contribution provision becomes applicable, "there must be payment by one judgment debtor of a judgment outstanding against him and others." Thus, a tortfeasor who paid a judgment after it had been reversed as to a co-defendant had no right to appeal. CPLR 1402(b) overturned the *Baidach* rule by allowing a tortfeasor to appeal a reversal or modification of a joint judgment as to a co-defendant if he subsequently pays the judgment. *See* 2A WK&M ¶ 1402.05.

50 *See* Fox v. Western N.Y. Motor Lines, Inc., 257 N.Y. 305, 308, 178 N.E. 289, 290 (1931); Perlbinder v. D'Aquilla Bros. Contracting Co., 12 Misc. 2d 790, 177 N.Y.S.2d 878 (Sup. Ct. N.Y. County 1958), *aff'd mem.*, 7 App. Div. 2d 968, 183 N.Y.S.2d 988 (1st Dep't 1959); Bonadonna v. City of Buffalo, 156 Misc. 225, 281 N.Y.S. 343 (Sup. Ct. Erie County 1935).

51 In Westchester Light Co. v. Westchester County Small Estates Corp., 278 N.Y. 175, 15 N.E. 567 (1938), the Court recognized that an independent duty or obligation owed by a third-party defendant is sufficient basis for an action for indemnity even though the third party was not joined in the original action.

52 Burke v. City of New York, 2 N.Y.2d 90, 95, 138 N.E.2d 332, 335, 157 N.Y.S.2d 1, 5 (1956); McFall v. Compagnie Maritime Belge, 304 N.Y. 314, 328, 107 N.E.2d 463, 471 (1952); Fox v. Western N.Y. Motor Lines, Inc., 257 N.Y. 305, 308, 178 N.E. 289, 290 (1931). *See also* RESTATEMENT OF RESTITUTION, Introductory Note §§ 86-102 (1937).

53 *See* Melodee Lane Lingerie Co. v. American Dist. Tel. Co., 18 N.Y.2d 57, 218 N.E.2d 661, 271 N.Y.S.2d 937 (1966); Jackson v. Associated Dry Goods Corp., 13 N.Y.2d 112, 192 N.E.2d 167, 242 N.Y.S.2d 210 (1963); Bush Terminal Bldgs. Co. v. Luckenbach S.S. Co., 9 N.Y.2d 426, 174 N.E.2d 516, 214 N.Y.S.2d 428 (1961); Kennedy v. Bethlehem Steel Co., 282 App. Div. 1001, 125 N.Y.S.2d 552 (4th Dep't) (per curiam), *aff'd mem.*, 307 N.Y. 875, 122 N.E.2d 753 (1954). *Cf.* Colon v. Board of Educ. of City of N.Y., 11 N.Y.2d 446, 184 N.E.2d 294, 230 N.Y.S.2d 697 (1962).

acts of each caused the injury and their fault was equal in degree and similar in character.[54] To avoid being found *in pari delicto*, defendants have drawn extremely fine distinctions concerning the relative degree of fault attributable to each of the participants in a joint tort. These distinctions have fallen into two broad categories: (1) those based on the type of duty owed to the plaintiff; and (2) those based on the type of negligence attributable to each joint tortfeasor. These categories are not necessarily mutually exclusive, and the courts have frequently used elements of each interchangeably. In distinguishing the types of duty owed to the plaintiff, the courts have used such terms as primary or secondary, actual or vicarious, and personal or technical.[55] In differentiating the types of negligence chargeable to each tortfeasor, the courts have applied the active-passive dichotomy.[56]

Unfortunately, the distinction between indemnity and contribu-

[54] *See* Bernstein v. El-Mar Painting & Decorating Co., 13 N.Y.2d 1053, 195 N.E.2d 456, 245 N.Y.S.2d 772 (1963) (mem.); Bush Terminal Bldgs. Co. v. Luckenbach S.S. Co., 9 N.Y.2d 426, 174 N.E.2d 516, 214 N.Y.S.2d 428 (1961); Dolnick v. Edward Donner Lumber Corp., 275 App. Div. 954, 89 N.Y.S.2d 783 (2d Dep't 1949), *aff'd mem.*, 300 N.Y. 660, 91 N.E.2d 322 (1950).

[55] These terms have generally been used in municipality liability cases and in actions predicated on the principle of *respondeat superior*. *See, e.g.*, Jackson v. Associated Dry Goods Corp., 13 N.Y.2d 112, 192 N.E.2d 167, 242 N.Y.S.2d 210 (1963); Sobel v. City of New York, 9 N.Y.2d 187, 173 N.E.2d 771, 213 N.Y.S.2d 36 (1961); Dunn v. Uvalde Asphalt Paving Co., 175 N.Y. 214, 67 N.E. 439 (1903); Oceanic Steam Nav. Co. v. Compania Transatlantica Espanola, 134 N.Y. 461, 31 N.E. 987 (1892); City of Rochester v. Montgomery, 72 N.Y. 65 (1878); Iroquois Gas Corp. v. International Ry., 240 App. Div. 432, 270 N.Y.S. 197 (4th Dep't 1934); Commercial Cas. Ins. Co. v. Capital City Sur. Co., 224 App. Div. 500, 231 N.Y.S. 169 (1st Dep't 1928); Fedden v. Brooklyn Dist. Terminal, 204 App. Div. 741, 199 N.Y.S. 9 (2d Dep't 1923); Bonadonna v. City of Buffalo, 156 Misc. 225, 281 N.Y.S. 343 (Sup. Ct. Erie County 1935).

[56] The origin of the active-passive terminology is not certain, but the conceptualization began to emerge in City of Brooklyn v. Brooklyn City R.R., 47 N.Y. 475, 487 (1872):

> Where the parties are not equally criminal, the principal delinquent may be held responsible to a co-delinquent for damage paid by reason of the offence in which both were concerned in different degrees as perpetrators.

The Court of Appeals refined this language in Village of Port Jervis v. First National Bank, 96 N.Y. 550, 555 (1884): "The liability of the author of the act which occasions the injury . . . rests upon his original liability to all persons who may have suffered damages from his affirmative act of negligence." By 1905, this language had evolved to the point where the Appellate Division, Second Department, in Phoenix Bridge Co. v. Creem, 102 App. Div. 354, 356, 92 N.Y.S. 855, 857 (2d Dep't), *aff'd mem.*, 185 N.Y. 580, 78 N.E. 1110 (1906), described a party who recovered over as having been "entitled to indemnity from the active wrongdoer."

Subsequently, a long line of decisions has attempted to clarify this conceptualization. *See* Ritto v. Goldberg, 27 N.Y.2d 887, 265 N.E.2d 772, 317 N.Y.S.2d 361 (1970) (per curiam); Melodee Lane Lingerie Co. v. American Dist. Tel. Co., 18 N.Y.2d 57, 218 N.E.2d 661, 271 N.Y.S.2d 937 (1966); Bush Terminal Bldgs. Co. v. Luckenbach S.S. Co., 9 N.Y.2d 426, 174 N.E.2d 516, 214 N.Y.S.2d 428 (1961); Putvin v. Buffalo Elec. Co., 5 N.Y.2d 447, 158 N.E.2d 691, 186 N.Y.S.2d 15 (1959); Burke v. City of New York, 2 N.Y.2d 90, 138 N.E.2d 332, 157 N.Y.S.2d 1 (1956); Traub v. Dinzler, 309 N.Y. 395, 131 N.E.2d 564 (1955); McFall v. Compagnie Maritime Belge, 304 N.Y. 314, 107 N.E.2d 463 (1952); Schwartz v. Merola Bros. Constr. Corp., 290 N.Y. 145, 48 N.E.2d 299 (1943); Thompson-Starrett Co. v. Otis Elevator Co., 271 N.Y. 36, 2 N.E.2d 35 (1936); Scott v. Curtis, 195 N.Y. 424, 88 N.E. 794 (1909).

tion has been confused in attempts to categorize fault between tortfeasors according to the active-passive dichotomy.[57] Finding that litigation entangled in distinctions between "active" and "passive" fault had greatly increased from 1941 to 1952, the Law Revision Commission proposed a more flexible contribution rule as a substitute for the prevailing practice.[58] It recognized the conceptual distinction between contribution and indemnity, but noted the difficulty of formulating a clear test to clarify that distinction in practice.[59] While the "active-passive" or "primary-secondary" dichotomy has been the basis of New York law as to when indemnity is appropriate, it has been difficult to set down any definitive rule as to the availability of such relief.[60]

Early attempts to distinguish acts of omission from those of commission soon splintered into numerous classifications. While acts of omission with acquiescence were deemed active negligence,[61] finding constructive knowledge alone was held to be an insufficient basis for finding acquiescence.[62] The problem was further complicated by dis-

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[57] *See* 1952 REP., *supra* note 45, at 37-55; Note, *Indemnity Among Joint Tort-feasors in New York: Active and Passive Negligence and Impleader*, 28 FORDHAM L. REV. 782 (1960) [hereinafter *Indemnity in New York*].

[58] 1952 REP. 28. The Commission stated in part:

> In the absence of any rule for pro-rating the burden, or apportioning it equally among those responsible, the trend is toward development through precedent of rules of law defining failure in the duty of care owed in a variety of typical situations as "active" or "passive" negligence and thus fixing a rule of indemnity in many cases where a rule of contribution would be a fairer and more reasonable one.

Id. 37.

[59] The Commission in an attempt to define those situations where indemnity has been allowed approached the problem through factual similarities and arrived at the following categories: (1) sidewalk cases; (2) building construction cases; (3) injury in or about buildings cases; (4) auto collision cases; (5) miscellaneous cases.

A distinction between the terminology "active-passive" and "primary-secondary" can be implied from the Commission report, in that "active" is used in terms of causation, while "primary" is used in terms of responsibility.

[60] *See* 2 WK&M ¶ 1007.02. For a history of New York indemnity cases, see 1952 REP. 37-55; Meriam & Thornton, *Indemnity Between Tort-feasors: An Evolving Doctrine in the New York Court of Appeals*, 25 N.Y.U.L.Q. REV. 845 (1950). *See generally* Davis. "[I]n deciding what negligence is 'active' and what is 'passive,' a trial judge will receive almost as much assistance from tossing a coin as he will from pondering the opinions of the appellate tribunals." Thornton & McNiece, *Torts & Workmen's Compensation*, 32 N.Y.U.L. REV. 1465, 1471 (1957).

[61] *See* Phoenix Bridge Co. v. Creem, 102 App. Div. 354, 92 N.Y.S. 855 (2d Dep't 1905), *aff'd mem.*, 185 N.Y. 580, 78 N.E. 1110 (1906).

[62] *See* Central Hudson Gas & Elec. Corp. v. Costanzi, 140 N.Y.S.2d 185 (Sup. Ct. Westchester County 1955). Prior cases illustrate the various subtleties which were being read into the "active-passive" dichotomy. The Court, in Schwartz v. Merola Bros. Constr. Corp., 290 N.Y. 145, 48 N.E.2d 299 (1943), drew a distinction between actual and constructive knowledge and held the former to be active negligence which defeated indemnity. In Tipaldi v. Riverside Mem. Chapel, 273 App. Div. 414, 78 N.Y.S.2d 12 (1st Dep't), *aff'd mem.*, 298 N.Y. 686, 82 N.E.2d 585 (1948), the court observed that the right to indemnity should be the same whether the fault of the primary wrongdoer was attributable to a negligent act of commission or omission. Dolnick v. Edward Donner Lumber Corp., 275

tinctions between delegable and non-delegable duties concerning original liability and by determinations concerning the rights and obligations of the negligent parties among themselves in terms of final liability.[63] Though the rules were not incomprehensible, complexity was increased by the number of parties involved, as where a property owner, a general contractor, and several subcontractors were brought into the action.[64]

An excellent evaluation of the "active-passive" or "primary-secondary" dichotomy was set out in *McFall v. Compagnie Maritime Belge*.[65] A longshoreman had been injured by carbon tetrachloride fumes which had escaped due to alleged defects in containers supplied by Dow Chemical Company. Dow in turn accused the plaintiff's employer, Transoceanic, of negligence in handling the drums and in failing to properly supervise the loading. The owner of the ship, Belgian Line, was chargeable with the non-delegable duty of providing a safe place to work. Although Dow was denied indemnity, Dow's negligence in containing the substance being deemed active, a right of indemnity was recognized in favor of Belgian Line, whose "mere failure to perform a non-delegable duty imposed by law" was held to be passive negligence.[66] The Court of Appeals, relying on *Tipaldi v. Riverside Memorial Chapel*,[67] concluded that tortfeasors guilty of negligence in law as to the person injured were not necessarily *in pari delicto* as to each other.

Most significant in the decision, however, was the statement by the Court that whether or not the act involved was one of omission,

> the factual disparity between the delinquency of Transoceanic and Dow and that of Belgian Line [was] so great here that the jury was justified in concluding that Belgian Line's fault of omission was only passive negligence.[68]

The new concept of "factual disparity" which emerged from *McFall* was a clear indication of judicial dissatisfaction with the absence of any

App. Div. 954, 89 N.Y.S.2d 783 (2d Dep't 1949), *aff'd mem.*, 300 N.Y. 660, 91 N.E.2d 322 (1950), continued the digression by holding that constructive knowledge could be equated with active negligence if a party failed in his duty to acquire actual knowledge. For further elaboration on this dissection of the active-passive rule, see *Indemnity in New York, supra* note 57, at 786-87; Note, *Indemnity among Tortfeasors in New York*, 39 CORNELL L.Q. 484, 498-99 (1954).

[63] *See* Tipaldi v. Riverside Mem. Chapel, 273 App. Div. 414, 78 N.Y.S.2d 12 (1st Dep't), *aff'd mem.*, 298 N.Y. 686, 82 N.E.2d 585 (1948); Central Hudson Gas & Elec. Corp. v. Costanzi, 140 N.Y.S.2d 185 (Sup. Ct. Westchester County 1955).

[64] *See* Schwartz v. Merola Bros. Constr. Corp., 290 N.Y. 145, 48 N.E.2d 299 (1943).

[65] 304 N.Y. 314, 107 N.E.2d 463 (1952).

[66] *Id.* at 329, 107 N.E.2d at 478.

[67] 273 App. Div. 414 (1st Dep't), *aff'd mem.*, 298 N.Y. 686, 82 N.E.2d 585 (1948).

[68] 304 N.Y. at 330, 107 N.E.2d at 471. "Whether negligence is passive or active is generally speaking, a question of fact for the jury." *Id.* at 328, 107 N.E.2d at 471.

satisfactory rule defining active and passive conduct and with the sterile nomenclature used to categorize such behavior. Several observers have viewed *McFall* as an attempt to resolve the confusion in terminology by demonstrating that the terms "active" and "passive" were not rules in themselves but findings of fact to guide the jury's evaluation of the relative culpability of the wrongdoers.[69]

Subsequent decisions made little use of the "factual disparity" concept as an analytical device but followed its implications by engaging in a more meaningful analysis of the respective culpabilities of the wrongdoers. For example, in *Putvin v. Buffalo Electric Co.*,[70] certain contractors who had done work in the plant of the decedents' employer were sued for personal injuries and wrongful death. The Court of Appeals, in affirming the denial of an attempted impleader by the contractors of the plant owner, offered several distinctive propositions in support of its decision. First, it asserted that since the complaint could be interpreted as including allegations of both active and passive negligence, the defendants would have a right of impleader against a third party charged with active negligence.[71] Second, the Court stated:

> It is the omission or failure to perform a nondelegable type of duty (e.g., the duty of an owner . . . to furnish the injured party with a safe place to work), as distinguished from the failure to observe for the protection of the interests of another person that degree of care and vigilance which the circumstances justly demand, which constitutes passive negligence entitling one to indemnity. . . .[72]

The *Putvin* decision, which emphasized the respective duties of the wrongdoers and liberalized the availability of impleader under the pleadings, was an earnest attempt to clarify the right of indemnity within the existing rules of third-party practice.

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69 *Indemnity in New York* at 787-88 (1960). After an analysis of *McFall*, the following generalizations were made:

> The decisions turn on a disparity in culpability between the parties. . . . This disparity would seem to be a mixed question of law and fact. The jury must ultimately determine whether the difference in culpability is such as to merit recovery, but it is the responsibility of the judge to determine whether the nature of the parties' actions justifies turning the matter over to the jury.

See also Note, *Indemnity among Tortfeasors in New York*, 39 CORNELL L.Q. 484, 499 (1954).

70 5 N.Y.2d 447, 158 N.E.2d 691, 186 N.Y.S.2d 15 (1959).

71 *Id.* at 455, 158 N.E.2d at 695, 186 N.Y.S.2d at 21. The Court cited Johnson v. Endicott Johnson Corp., 278 App. Div. 626, 101 N.Y.S.2d 922 (3d Dep't 1951). Subsequent cases have followed this rule: Jackson v. Associated Dry Goods Corp., 13 N.Y.2d 112, 192 N.E.2d 167, 242 N.Y.S.2d 210 (1963); Finley v. New York Cent. R.R., 50 Misc. 2d 194, 270 N.Y.S.2d 349 (Sup. Ct. Albany County 1965), *aff'd*, 25 App. Div. 2d 897, 269 N.Y.S.2d 386 (3d Dep't 1966); De Lilli v. Niagara Mohawk Power Corp., 11 App. Div. 2d 839, 202 N.Y.S.2d 857 (3d Dep't 1960).

72 5 N.Y.2d at 456, 158 N.E.2d at 696, 186 N.Y.S.2d at 22.

Contrastingly, in *Bush Terminal Buildings Co. v. Luckenbach Steamship Co.*,[73] the defendant, an operator of a pier, was denied any right to indemnity. The decision was consistent with the postulates of *Putvin* and *McFall* since the defendant was solely charged with creating and maintaining a dangerous situation. This allegation clearly distinguishes the failure to observe the requisite degree of care for the protection of others from the failure to furnish a safe place to work as was alleged in *Putvin*.

Perhaps the most significant aspect of the *Bush Terminal* case was the fact that the Court of Appeals therein reversed the lower court decision.[74] The lower court opinion was an exhaustive appraisal of the development of the New York law as to indemnity, and it had expressed deep dissatisfaction with the prevailing practice.[75]

Musco v. Conte[76] can also be read as representing further discontent with indemnity rules. An action had been brought for the wrongful death of a person whose hand had been crushed while he was helping to extricate the defendant's automobile. A third-party claim was asserted by the defendant against the hospital and an attendant who were alleged to have caused the death by negligently administering an anesthetic. The appellate division reversed the lower court dismissal of the third-party complaint and held that the defendant and the hospital were not joint tortfeasors, but successive and independent tortfeasors. Additionally, since the culpability of the defendant was of a lesser degree, the rule that impleader of a third party would not lie at

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[73] 9 N.Y.2d 426, 174 N.E.2d 516, 214 N.Y.S.2d 428 (1961).

[74] 11 App. Div. 2d 220, 202 N.Y.S.2d 172 (1st Dep't 1960).

[75] After reviewing the applicable principles as to the right to indemnity between joint tortfeasors, the court detailed its dissatisfaction with their application.

> Many difficulties . . . arise, and for two reasons. First, when the question arises on the pleadings and before trial, there are difficulties in interpreting the allegations of the complaint. The pleader (prime plaintiff) is hardly concerned with the problem among the defendants, *inter se*, and no effort is made to categorize the allegations to assist in the solution of the problem of liability among them.
>
> The second reason for difficulty, and the more basic one, stems from the uncertain applicability of the substantive law. Even when the evidentiary facts have been ascertained, there is often uncertainty as to whether indemnification is appropriate, especially where the right depends partly upon the weighing of the "comparative culpabilities" among different kinds of wrongdoing.

Id. at 225, 202 N.Y.S.2d at 179. The court expressed further disenchantment with the use of the active-passive dichotomy as the solution to these problems.

> The most serious difficulty with the "active-passive" terminology is that it can be manipulated to produce any result. One need only enlarge the definition of the act of the actor to make it "active," while by reducing the definition one can make the act passive."

Id. at 227, 202 N.Y.S.2d at 181. The court favored the use of primary-secondary terminology which it felt would lead to a legal analysis of the facts as opposed to a conclusory pronouncement through use of the terms "active" and "passive." *Id.* at 225-27, 202 N.Y.S.2d at 179-81.

[76] 22 App. Div. 2d 121, 254 N.Y.S.2d 589 (2d Dep't 1964).

the instance of a tortfeasor *in pari delicto* was inapplicable.[77] The language, "lesser degree," used in *Musco* was a marked departure from the "active-passive" standard and its subsequent refinements.

It was against this background that the Court of Appeals in *Dole* adopted a comparative fault approach in third-party practice.

Dole: *Equitable Apportionment Among Joint Tortfeasors*

On June 7, 1969, George Urban Milling Company fumigated a grain storage bin with methyl bromide, a deadly fumigant manufactured by Dow Chemical Company. The product had been labeled as poisonous and highly volatile. Shortly after the fumigation, Urban directed its employee, Ralph Dole, to clean the bin. Dole was exposed to the chemical and died as a result on June 11. Dole's administratrix-wife instituted a negligence action against Dow alone for wrongful death and pain and suffering, alleging that Dow had failed to properly label its highly dangerous product and had failed to adequately warn and instruct as to its use. Urban was immune from suit by its employee's estate under the Workmen's Compensation Law.[78]

In answer to the main complaint, Dow denied negligence on its part and alleged that the decedent had negligently caused his own death. In addition, Dow commenced a third-party action against Urban for indemnity against any recovery by the plaintiff. Dow alleged that Urban's negligence was active and primary in that it had "had actual knowledge of the danger in the use of Methyl Bromide and had sole control over its employees exposed to the Methyl Bromide,"[79] yet had created a dangerous and ultimately fatal condition. Dow deemed its negligence, if any, in labeling or warning, to have been passive and secondary, entitling it to implead Urban and recover over. Dow maintained that it had supplied Urban with sufficient instructions and literature regarding the fumigant's use.

On November 11, 1969, the Supreme Court, Erie County, denied Urban's motion to dismiss Dow's third-party complaint. Urban ap-

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[77] *Id.* at 126, 254 N.Y.S.2d at 594.

[78] N.Y. WORKMEN'S COMP. LAW § 11 (McKinney 1965). The exclusivity provision has been held not to bar recovery over from an employer by a third person sued by an employee. *See* Westchester Light Co. v. Westchester County Small Estates Corp., 278 N.Y. 175, 15 N.E. 567 (1938).

> The [third person] does not sue for damages "on account of" [the employee's] death. [He] asserts [his] own right of recovery for breach of an alleged independent duty or obligation owed to [him] by the [employer].

Id. at 179, 15 N.E. at 568.

[79] Brief for Appellant at 9, Dole v. Dow Chem. Co., 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972). A third-party complaint against McLeod Industrial Fumigators & City Exterminators, Inc., the product's distributor, was dismissed, and the plaintiff subsequently joined McLeod as a co-defendant. *Id.* at 3.

pealed, and the Appellate Division, Fourth Department, unanimously reversed and granted the motion.[80] The court reasoned that: (1) if Dow were successful in proving the allegations in its third-party complaint or those in its answer to the main complaint, the main complaint would be dismissed, and Dow would not require indemnity; and (2) if Dow were unsuccessful, its active negligence in improperly marketing a dangerous product would be established, and it would not be entitled to indemnity.[81]

Dow then appealed to have the third-party complaint reinstated, arguing that it had been charged with passive negligence in the main complaint and that the active-passive determination should await the trial. Most significantly, citing the difficulty of defining and applying the active-passive dichotomy and lamenting the "fundamental injustice" of suing a remote manufacturer alone when the employer who allegedly precipitated the injury was immune from suit by the plaintiff-employee's estate, Dow argued for a limited exception to the indemnity rules. Dow urged the Court of Appeals to

> judicially promulgate a liberal standard of impleader permitting a third-party complaint to be maintained against an actively negligent employer where the plaintiff, injured in the course of his employment, commences a negligence action against a remote defendant charging the remote defendant with only the failure or omission to act for the benefit of plaintiff.[82]

In response, on March 22, 1972, the Court of Appeals, per Judge Bergan, eliminated the active-passive test and permitted Dow to implead Urban.[83]

Initially, the Court decried such " 'artificial distinctions' " as active-passive negligence and misfeasance-nonfeasance,[84] which had "proven elusive and difficult of fair application,"[85] and categorized types of

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[80] 35 App. Div. 2d 149, 316 N.Y.S.2d 348 (4th Dep't 1970).

[81] *Id.* at 151, 316 N.Y.S.2d at 351.

[82] Brief for Appellant at 22, Dole v. Dow Chem. Co., 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972). The facts of *Dole* were not so dissimilar from those of prior cases as to require different treatment.

[83] 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972), *rev'g* 35 App. Div. 2d 149, 316 N.Y.S.2d 348 (4th Dep't 1970). The Court did not question the active quality of Dow's negligence. *Id.* at 147, 282 N.E.2d at 291, 331 N.Y.S.2d at 385, *citing* Jackson v. Associated Dry Goods Corp., 13 N.Y.2d 112, 116, 192 N.E.2d 167, 169, 242 N.Y.S.2d 210, 213 (1963); Colon v. Board of Educ. of City of New York, 11 N.Y.2d 446, 451, 184 N.E.2d 294, 297, 230 N.Y.S.2d 697, 702 (1962); Bush Terminal Bldgs. Co. v. Luckenbach S.S. Co., 9 N.Y.2d 426, 430, 174 N.E.2d 516, 517 *et seq.*, 214 N.Y.S.2d 428, 430 (1961); Putvin v. Buffalo Elec. Co., 5 N.Y.2d 447, 158 N.E.2d 691, 186 N.Y.S.2d 15 (1959); McFall v. Compagnie Maritime Belge, 304 N.Y. 314, 329-30, 107 N.E.2d 463, 471-72 (1952).

[84] 30 N.Y.2d at 150, 282 N.E.2d at 293, 331 N.Y.S.2d at 389, *quoting A Workable Rule of Contribution* at 126.

[85] *Id.* at 147, 282 N.E.2d at 291, 331 N.Y.S.2d at 386.

negligence as primary and secondary, preferring these terms as more technically accurate.[86] Turning to the paramount policy question of how responsibility should ultimately be distributed, the Court stated:

> There are situations when the facts would in fairness warrant what Dow here seeks — passing on to Urban all responsibility that may be imposed on Dow for negligence, a traditional full indemnification. There are circumstances where the facts would not, by the same test of fairness, warrant passing on to a third party any of the liability imposed. There are circumstances which would justify apportionment of responsibility between third-party plaintiff and third-party defendant, in effect a partial indemnification.[87]

After observing that at common law any apportionment among tortfeasors was barred by "the unwillingness of the law as a matter of policy to make relative value judgments of degrees of culpability among wrongdoers,"[88] the Court concluded that the doctrine is no longer strictly applied, citing CPLR 1401 and the active-passive dichotomy itself. Stating that the test had become a kind of measure of degrees of responsibility, it averred that "the result has been that there has in fact emerged from the statutory change and from the judicial decisions an actual apportionment among those who participate responsibly in actionable torts."[89]

Because of these changes and because of the widespread dissatisfaction with the imprecision and inequities of the active-passive limitation, the Court reached

> [t]he conclusion . . . that where a third party is found to have been responsible for a part, but not all, of the negligence for which a defendant is cast in damages, the responsibility for that part is recoverable by the prime defendant against the third party. To reach that end there must necessarily be an apportionment of responsibility in negligence between those parties.[90]

The right to an apportionment of liability among joint tortfeasors or to full indemnity was to be predicated on relative responsibility and

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[86] *Id.* The Court did not further explain its preference.

[87] *Id.* The Court adopted the following statement:

> As long as our present tort system is retained, an effective contribution and indemnity scheme is necessary to handle the growing problems created by multiple tort liability. . . . The present system runs counter to tort policy goals of deterrence, equitable loss sharing by all the wrongdoers, effective loss distribution over a large segment of society, and rapid compensation of the plaintiff — as well as the judicial economy interest in settling all matters arising out of the same transaction in one proceeding.

Id. at 150, 282 N.E.2d at 293, 331 N.Y.S.2d at 389, *quoting Contribution and Indemnity in California* at 516.

[88] *Id.* at 147, 282 N.E.2d at 291, 331 N.Y.S.2d at 386.

[89] *Id.* at 148, 282 N.E.2d at 292, 331 N.Y.S.2d at 387.

[90] *Id*, at 148-49, 282 N.E.2d at 292, 331 N.Y.S.2d at 387.

was to be determined by the jury on the facts.[91] The Court emphasized that " '[t]he deciding factor, then, should be fairness as between the parties.' "[92]

Procedurally, the Court allowed trial courts to determine whether to try together or separately the separate claims of the plaintiff against the defendant and the defendant-third-party plaintiff against the third-party defendant. Either or both claims could be decided by the court at the stipulation of the parties. If tried together by a jury, the jury would be instructed to consider the claim over only if the third-party plaintiff were found negligent. A *Dole* apportionment also would be available in a separate action.[93] The right to contribution under CPLR 1401 was deemed inapplicable where there has been a *Dole* apportionment:

> In authorizing equally shared contribution among tortfeasors jointly found liable, this statute did not contemplate an apportionment already made in the judgment, and the "joint" responsibility described was not one of indemnity.[94]

Chief Judge Fuld and Judges Breitel, Jasen, and Gibson concurred in Judge Bergen's opinion. Judges Burke and Scileppi dissented and voted to affirm.

The Impact of Dole

The revolutionary nature of the *Dole* decision is much greater than the Court indicated. The Court suggested that an actual system of apportionment had developed prior to *Dole*. It cited CPLR 1401, which allows contribution on a pro rata basis, and the broad determination made as to active or passive negligence, which entails a total shifting, and not an apportionment of liability. Clearly, the Court was too modest in describing its decision as part of a previous system of apportionment.

Dole establishes a kind of comparative negligence among defendants[95] by (1) eliminating the requirement of a joint judgment under CPLR 1401, and (2) allowing an equitable apportionment of

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91 *Id.* at 153, 282 N.E.2d at 295, 331 N.Y.S.2d at 391-92.

92 *Id.* at 151, 282 N.E.2d at 294, 331 N.Y.S.2d at 390, *quoting* Leflar at 159.

93 *Id.* at 149, 282 N.E.2d at 292, 331 N.Y.S.2d at 387, *citing* Westchester Light Co. v. Westchester County Small Estates Corp., 278 N.Y. 175, 15 N.E. 567 (1938).

94 *Id.* at 153, 282 N.E.2d at 295, 331 N.Y.S.2d at 391.

95 *See* Sanchez v. Hertz Corp., 70 Misc. 2d 449, 450, 333 N.Y.S.2d 699, 701 (Sup. Ct. Kings County 1972) (mem.): "The *Dole* case . . . enunciates a new doctrine respecting the presence of co-tortfeasors in negligence actions, to wit: comparative-negligence as between defendants. . . ."

damages among joint tortfeasors. This dramatic development is a welcome landmark in New York jurisprudence.

Since the *Dole* Court expressed a preference for the primary-secondary terminology and omitted those terms from its list of artificial distinctions, one may wonder whether the old active-passive test has yielded to a new primary-secondary test. It is clear that *Dole* allows an active tortfeasor to implead another active tortfeasor. But, under *Dole*, can an active tortfeasor implead a passive tortfeasor? Or, can a primary tortfeasor implead a secondary tortfeasor? The looseness of the Court's language in this regard raises these questions, and it is possible that a future Court may seize on such language to retreat from the broad and largely uncharted course set by *Dole*. The Court imagined different situations where full indemnification, partial indemnification, or no indemnification was appropriate, but did not specify or illustrate. The ultimate question, then, is how broad was the broad and frequently ambiguous *Dole* language intended to be? What is the scope of *Dole*?

All indications are that the impact of *Dole* will be vast.[96] One eminent authority has concluded that "[t]he potential of the *Dole* doctrine is astounding."[97] Initially, *Dole* represents new law on indemnification. It eliminates the active-passive test for indemnification, permitting partial indemnification among joint tortfeasors based on an apportionment of responsibility. While *Dole* concerned third-party practice, it logically applies in the cross-claim context when a defendant seeks indemnity from a co-defendant. The Court of Appeals, in *Kelly v. Long Island Lighting Co.*,[98] has permitted a cross-claim for apportionment of liability among defendants.

Kelly, a co-plaintiff, was employed by a subcontractor on a construction site owned by defendant Herrick Manor, Inc., the general

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[96] "It will probably be years before the full impact of *Dole* can be measured." McLaughlin, *New York Trial Practice*, 168 N.Y.L.J. 48, Sept. 8, 1972, at 1, col. 1. For a comprehensive discussion of the ramifications of *Dole* by Professor David D. Siegel, see 7B McKINNEY'S CPLR 3019, supp. commentary at 205-38 (1972).

[97] McLaughlin, *New York Trial Practice*, 167 N.Y.L.J. 93, May 12, 1972, at 4, col. 1.

[98] 31 N.Y.2d 25, 286 N.E.2d 241, 334 N.Y.S.2d 851 (1972) (5-2). A *Dole* cross-claim has also been allowed in Frey v. Bethlehem Steel Corp., 30 N.Y.2d 764, 284 N.E.2d 579, 333 N.Y.S.2d 425 (1972) (mem.); Wood v. City of New York, 39 App. Div. 2d 534, 330 N.Y.S.2d 923 (1st Dep't 1972) (mem.); Nucelli v. Dickens, 70 Misc. 2d 143, 332 N.Y.S.2d 712 (Sup. Ct. Monroe County 1972) (mem.); Kelly v. Diesel Constr., 70 Misc. 2d 686, 334 N.Y.S.2d 309 (Sup. Ct. N.Y. County 1972).

Dole impleader has been allowed in Vaughan v. B&B Supermarket, Inc., 39 App. Div. 2d 825, 333 N.Y.S.2d 53 (4th Dep't 1972) (mem.); Murray v. Rupp Rental Corp., 39 App. Div. 2d 637, 332 N.Y.S.2d 552 (4th Dep't 1972) (mem.); Langner v. Eschwege, 39 App. Div. 2d 653, 332 N.Y.S.2d 16 (1st Dep't 1972) (mem.); Keefe v. Balling Constr., Inc., 39 App. Div. 2d 638, 331 N.Y.S.2d 293 (4th Dep't 1972) (mem.).

contractor. Kelly and his wife sought to recover for the injuries he suffered when, in the course of his employment, he touched a steel bucket attached to a cable from the boom of a crane in operation at the site, the boom being in contact with high tension wires owned and maintained by defendant Long Island Lighting Company (LILCO). LILCO knew of the construction, but took no precautionary measures. Herrick's president knew of the danger, but gave no warning prior to the accident. Herrick and LILCO cross-claimed against each other for judgment over if either were held liable to the plaintiff.

The Supreme Court, Kings County, dismissed both cross-claims on the ground that Herrick and LILCO had been guilty of active negligence. The jury returned a verdict for the plaintiffs against both defendants. The Appellate Division, Second Department, affirmed.[99]

On Herrick's appeal, the Court of Appeals, per Judge Jasen, modified the appellate division's order and allowed Herrick's cross-claim,[100] reiterating *Dole*'s breadth and its simple reliance on the fairness of an apportionment rule:

> The rule as stated in *Dole* now permits apportionment of damages among joint or concurrent tort-feasors regardless of the degree or nature of the concurring fault. We believe the new rule of apportionment to be pragmatically sound, as well as realistically fair. To require a joint tort-feasor who is, for instance, 10% causally negligent to pay the same amount as a co-tort-feasor who is 90% causally negligent seems inequitable and unjust. The fairer rule, we believe, is to distribute the loss in proportion to the allocable concurring fault.[101]

The Court, having held in *Dole* that such an apportionment is available under CPLR 1007, "perceive[d] no reason why CPLR 3019(b) may not likewise be employed."[102]

In *Sorrentino v. United States*,[103] the United States District Court, Eastern District of New York, was presented with a *Dole* claim in the context of a counterclaim, where one of the plaintiffs was involved in more than one capacity. The infant plaintiff was struck and injured by a government vehicle. The child sued for his personal injuries by his

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99 36 App. Div. 2d 822, 321 N.Y.S.2d 337 (2d Dep't 1971) (mem.).

100 31 N.Y.2d at 29, 286 N.E.2d at 243, 334 N.Y.S.2d at 854. Judges Burke and Scileppi dissented. They voted to reverse and dismiss the complaint as against Herrick on the ground that its negligence had not been established.

101 *Id.* Since the jury found both defendants negligent and the defendants had stipulated that the trial judge decide the cross-claims, the Court remitted the case to the Supreme Court, Kings County, for the court to fix the percentages of liability. *Id.* at 29-30, 286 N.E.2d at 243, 334 N.Y.S.2d at 855.

102 *Id.* at 29 n.3, 286 N.E.2d at 243 n.3, 334 N.Y.S.2d at 854 n.3.

103 344 F. Supp. 1308 (E.D.N.Y. 1972).

father as guardian ad litem, and his father sued for medical expenses and loss of the infant's services. The government moved for leave to amend its answer to include allegations of the parents' negligent supervision, a counterclaim against the plaintiff-father, and a third-party complaint against the parents. In the proposed counterclaim, the government asked for recovery over against any judgment against it. Citing *Dole* and *Kelly*, the court granted the government's motion, stating that

> the Government under *Dole*, if it can show that parental negligence was partly causative of the infant's injury and damage, can recover from the parents so much of the entire damage for which it may be held liable as is apportionable to the contribution of negligence of the parents compared with the Government's contribution of negligence.[104]

While *Dole* was a negligence case, it logically should also apply in the strict liability and breach of warranty areas, where liability is imposed without fault. In *Walsh v. Ford Motor Co.*,[105] an action for negligence and breaches of implied and express warranties, the Supreme Court, Nassau County, applied *Dole* to the implied warranty area. The jury returned a verdict for the plaintiff-car owner, injured in an accident caused by a defective carburetor, against Ford Motor Company, the manufacturer, on all three causes of action, and against McGoldrick Mercury Motors, the dealer, on negligence and breach of implied warranty. McGoldrick cross-claimed against Ford on the negligence and implied warranty causes. Although finding McGoldrick guilty of active negligence, the court allowed both cross-claims, stating:

> Even though the *Dole* case was concerned only with a negligence action, the principle developed in that case should also be and is applied to these implied warranty causes of action because they arose only because of defendants' negligence.[106]

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104 *Id.* at 1309. A *Dole* counterclaim has also been allowed in Meade v. Roberts, 71 Misc. 2d 120, 335 N.Y.S.2d 349 (Sup. Ct. Broome County 1972); Yarish v. Dowling, 70 Misc. 2d 467, 333 N.Y.S.2d 508 (Sup. Ct. Queens County 1972) (mem.) (third-party complaint deemed supplemental answer; counterclaim against plaintiff-driver to apply to co-plaintiff-passenger's cause of action); DeLucia v. Bundock, 168 N.Y.L.J. 12, July 19, 1972, at 13, col. 4 (Sup. Ct. Westchester County); and Lipson v. Gewirtz, 70 Misc. 2d 599, 334 N.Y.S.2d 662 (Dist. Ct. Nassau County 1972) (defendants granted leave to amend answer to assert counterclaim against co-plaintiff-driver). In Sanchez v. Hertz Corp., 70 Misc. 2d 449, 333 N.Y.S.2d 698 (Sup. Ct. Kings County 1972) (mem.), the defendants were allowed to "cross-complain" against a co-plaintiff-administrator-driver.

105 70 Misc. 2d 1031, 335 N.Y.S.2d 110 (Sup. Ct. Nassau County 1972) (mem.).

106 Id. at —, 335 N.Y.S.2d at 114.

> By extending the *Dole* doctrine into the warranty field, Justice Pittoni . . . arrived at a result which is every bit as sweeping as *Dole*. Heretofore, warranty, while wandering in the mists which separate contract from tort law, has been uniformly regarded as a form of liability without fault. Under the *Ford Motor*

Whether *Dole* will encompass the area of intentional torts is a closer question. The right to a *Dole* apportionment was specifically conferred on "parties involved together in causing damage by negligence. . . ."[107] At common law, the rule against contribution was devised to discourage intentional torts by allowing the plaintiff to require one joint tortfeasor to satisfy all damages flowing from a joint tort. Later, this rule was extended by American courts to include negligence. It is clear that *Dole* has totally removed this restriction in negligence cases. It may be argued, however, on deterrence grounds, that *Dole* should not be applied to intentional torts. But it is doubtful that the unavailability of apportionment would be an effective deterrent to the potential tortfeasor, especially in view of the questionable validity of even the death penalty as a deterrent.[108] Since the intentional joint tortfeasor now has the right to obtain contribution under CPLR 1401, it is conceivable that he will be granted the right to a *Dole* apportionment. It seems likely, however, that the Court of Appeals will deny this right to intentional tortfeasors on other public policy grounds.

Furthermore, *Dole* has called into question the continued vitality of CPLR 1401, which allows a joint tortfeasor to obtain contribution when he has paid more than his pro rata share of a joint judgment. After *Dole* and *Kelly*, a defendant can implead a joint tortfeasor and obtain a *Dole* apportionment, or he can cross-claim against a co-defendant for such an apportionment. He can also seek apportionment in an independent action. And an unequal *Dole* apportionment cannot be upset by subsequent use of CPLR 1401. Thus, it appears that the contribution statute is largely superseded by *Dole*. Legislative reconsideration of CPLR 1401 is clearly in order. If *Dole* is held inapplicable to intentional torts, CPLR 1401 will remain applicable in that area. Nevertheless, CPLR 1401 should be harmonized with *Dole*. It should be redrafted to provide for contribution when a joint tortfeasor has paid more than his apportioned share of damages (*i.e.*, where there was a right to apportionment and no requirement of a joint judgment) or more than his pro rata share of a joint judgment (*i.e.*, where there was a right to contribution but no right to apportionment). The joint judgment requirement for contribution when there is no right to apportion-

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Co. decision, however, it now appears that if the court can find some way to apportion damages, i.e., some disparity in the fault of the co-defendants, it will do so.

McLaughlin, *New York Trial Practice*, 168 N.Y.L.J. 48, Sept. 8, 1972, at 1, col. 2.

[107] Dole v. Dow Chem. Co., 30 N.Y.2d 143, 153, 282 N.E.2d 288, 295, 331 N.Y.S.2d 382, 391 (1972).

[108] *See* Furman v. Georgia, 408 U.S. 238, 314 (1972) (Marshall, J., concurring); K. MENNINGER, THE CRIME OF PUNISHMENT (1968).

ment could be eliminated if the Legislature determines that further liberalization would be salutary.

The fact that *Dole* indemnity can be pursued in a separate action raises the problem of waiver. Under what circumstances, if any, will a court hold that the right to a *Dole* apportionment has been intentionally relinquished? The *Dole* Court itself imposed no restrictions on the option of an independent action. Nevertheless, there may be circumstances in which a waiver will be found when a defendant does not implead a co-tortfeasor. The strongest case for waiver will occur when a defendant chooses not to cross-claim against a co-defendant. At this point in *Dole*'s development, it would be premature to adopt a strict waiver policy.

The practitioner should, of course, avoid potential waiver problems by resolving all issues arising from a breach of duty in one action. Since third-party practice is consistent with the CPLR's mandate for just, speedy, and inexpensive determination of disputes[109] and in the interest of economical judicial administration, it should be encouraged. A single fact-trier should determine the main claim and the proportionate responsibility of all participants. It can be anticipated that courts will dismiss or sever third-party actions only where the rights of a party would be clearly prejudiced otherwise.[110] An independent action should only be commenced where jurisdiction could not have been obtained over the defendant at the time of the original action.

In *Kelly v. Long Island Lighting Co.*,[111] the Court of Appeals applied *Dole*, stating: "We, of course, give effect to the law as it exists at the time of our decision."[112] Additionally, it appears that *Dole* will be retroactive.[113] *Dole* represents a new substantive right; it does not prejudice any right, and therefore, should be given full retroactive effect. For cases pending when *Dole* was decided, amendment of the pleadings and perhaps supplementary disclosure proceedings will be

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109 CPLR 104. "To avoid a multiplicity of suits, the best procedure would be to bring all persons before the Court in the one action." Lipson v. Gewirtz, 70 Misc. 2d 599, 334 N.Y.S.2d 662 (Dist. Ct. Nassau County 1972).

110 *See* Sanchez v. Hertz Corp., 70 Misc. 2d 449, 450, 333 N.Y.S.2d 699, 701 (Sup. Ct. Kings County 1972) (mem.): "[W]here either indemnity or contribution is desired, [Dole] permits the widest latitude in joining defendants. . . ."

111 31 N.Y.2d 25, 286 N.E.2d 241, 334 N.Y.S.2d 851 (1972).

112 *Id.* at 29 n.3, 286 N.E.2d at 243 n.3, 334 N.Y.S.2d at 854 n.3, *citing, e.g.*, People v. Loria, 10 N.Y.2d 368, 179 N.E.2d 478, 223 N.Y.S.2d 462 (1961).

113 *See* Meade v. Roberts, 71 Misc. 2d 120, 122, 335 N.Y.S.2d 349, 352 (Sup. Ct. Broome County 1972) ("The *Dole* decision was intended to be remedial in nature and is applicable retrospectively."); Sanchez v. Hertz Corp., 70 Misc. 2d 449, 451, 333 N.Y.S.2d 699, 703 (Sup. Ct. Kings County 1972) (mem.) (retroactive application). For favorable discussion of retroactive application, see Keeton, *Comment on* Maki v. Frelk, 21 VAND. L. REV. 906, 911-12 (1968).

in order. For cases already decided, an independent action for *Dole* indemnity should be allowed, provided it is commenced within six years after satisfaction of the original judgment.[114]

Dole: *A Harbinger of Comparative Negligence in New York*

Dole establishes a rule of comparative negligence among defendants, relying on the inherent fairness of an apportionment rule. It has been opined that *Dole* "set[s] New York on a course which will lead inexorably to the judicial adoption of the doctrine of comparative negligence."[115] Presently, a plaintiff must prove his freedom from contributory negligence in order to recover. This anomaly is most striking in the context of an independent suit for *Dole* indemnity where a defendant becomes a plaintiff and recovers despite fault through an apportionment of liability:

> [I]f the plaintiff is contributorily negligent, but his contributory negligence was only 5 per cent responsible for the damage caused by the defendant, should not the plaintiff, by parity of reasoning from Dole, now be entitled to recover 95 per cent of his damages from the more culpable defendant?[116]

The contributory negligence rule, which has been termed "a defendant's substantive right,"[117] mandates a total denial of relief to a plaintiff who has contributed to his own injury, even in the slightest degree.[118] The concept of negligence as a distinct area of legal liability did not begin "to take shape" until the late eighteenth century.[119] Previously, liability was based on causation, *i.e.*, the one who caused the

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114 The statute of limitations for contract actions is six years from the date that the cause of action accrued. CPLR 213.

> The general rule is . . . that the action [for indemnity] accrues not at the time of the commission of the tort for which indemnity is sought, but at the time of the payment of the judgment . . . ; and its rule applies as well to third-party complaints. . . .

Musco v. Conte, 22 App. Div. 2d 121, 125-26, 254 N.Y.S.2d 589, 595 (2d Dep't 1964).

115 McLaughlin, *New York Trial Practice*, 167 N.Y.L.J. 93, May 12, 1972, at 1, col. 1. *But see* McLaughlin, *New York Trial Practice*, 168 N.Y.L.J. 8, July 13, 1972, at 4, col. 1: "It now appears that *Dole* will have absolutely no impact on plaintiffs, and that the apportionment of damages between the co-defendants is a matter of concern solely to those defendants."

116 McLaughlin, *New York Trial Practice*, 167 N.Y.L.J. 93, May 12, 1972, at 4, col. 1.

117 Note, *Contribution Among Joint Tortfeasors When One Tortfeasor Enjoys a Special Defense Against Action by the Injured Party*, 52 CORNELL L.Q. 407, 412 (1967). *See* Fitzpatrick v. International Ry., 252 N.Y. 127, 134, 169 N.E. 112, 115 (1929) (a leading New York comparative negligence case; verdict based on Ontario comparative negligence statute upheld where plaintiff sued for injuries suffered in Canada while employed by the defendant, a New York corporation).

118 *See* Fitzpatrick v. International Ry., 252 N.Y. 127, 134, 169 N.E. 112, 115 (1929); Grippens v. New York Cent. R.R., 40 N.Y. 34 (1869).

119 2 HARPER & JAMES 1195.

injury, regardless of culpability, was liable in damages.[120] In formulating their policy on recovery for negligence, the courts rejected a proportional or comparative approach in favor of an "all or nothing form."[121] The rationale for this stringent rule was judicial unwillingness to aid wrongdoers, even where their conduct was mere "neglectfulness."[122]

Although a system of dividing damages has existed in cases of mutual fault in the English admiralty court since the seventeenth century,[123] this concept was not applied in the English courts of law, where *Butterfield v. Forrester*[124] established the rule of contributory negligence as a complete bar to recovery. The plaintiff therein, while "riding violently" down a highway, was knocked down by a pole negligently left by the defendant. From these words of Chief Justice Ellenborough, the rule has been extracted:[125] "A party is not to cast himself upon an

120 *See id.* Weaver v. Ward, 80 Eng. Rep. 284 (K.B. 1617), is an early case stating the causation rule. Originally, the contributory negligence rule was invariably explained in terms of proximate causation, *i.e.*, the plaintiff was barred from recovery because his negligence was the sole proximate cause of his injury. This rationale lost its vigor when the courts began to recognize that an injury could result from more than one proximate cause. *See* Leflar, *The Declining Defense of Contributory Negligence*, 1 ARK. L. REV. 1, 2 (1946). For discussion of the relation between contributory negligence and proximate causation and criticism of some courts' failure to distinguish the concepts, see 2 HARPER & JAMES 1199-1201; PROSSER, SELECTED TOPICS ON THE LAW OF TORTS 5 (1954) [hereinafter SELECTED TOPICS]; Green, *Contributory Negligence and Proximate Causation*, 6 N.C.L. REV. 3, 11 *et seq.* (1927).

121 2 HARPER & JAMES 1207.

122 *See* Leflar at 132. One basis for criticism of this viewpoint is its inconsistency. Courts will allow plaintiffs with "unclean hands" to recover under certain circumstances, *e.g.*, when the "Last Clear Chance" doctrine is applied. *See* PROSSER 417. For appraisals of the contributory negligence rule and its justifications, see 2 HARPER & JAMES 1199-1209; SELECTED TOPICS, *supra* note 120, at 5-7; Green, *Illinois Negligence Law*, 39 ILL. L. REV. 36 (1944); Lowndes, *Contributory Negligence*, 22 GEO. L.J. 674, 675-85 (1934); Mole & Wilson, *A Study of Comparative Negligence*, 17 CORNELL L.Q. 604, 643-45 (1932). "No one has ever succeeded in justifying [the rule], and no one ever will." SELECTED TOPICS 7.

123 *See* Mole & Wilson, *A Study of Comparative Negligence*, 17 CORNELL L.Q. 333, 341-46 (1932). The first decision to divide damages in a collision case in England appeared in 1614, and thereafter the practice of apportionment was expanded to various situations until it was adopted generally by the House of Lords in Hay v. Le Neve, [1824] A.C. 395 (Scot.), approving the famous dictum of The Woodrup Sims, 2 Dodson Adm. 83, 85 (1815). In 1854, the United States Supreme Court held that apportionment should be used in collision cases in the admiralty courts. *See* The Schooner Catherine, 58 U.S. (17 How.) 170 (1854). This was further extended to all maritime torts in 1890. *See* The Max Morris, 137 U.S. 1 (1890).

Originally, the admiralty courts utilized the equal division rule of damages where both ships were at fault, rather than the pure percentage apportionment approach. The former method has been criticized as creating, although to a lesser degree, the same injustice as the contributory negligence rule, in that a party partially at fault incurs more damages than he deserves. *See* Mole & Wilson, *supra*, at 341. England statutorily adopted the pure apportionment rule in 1911, but the United States still adheres to the equal division rule in collision cases. *See* Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 476 (1953). In maritime personal injury cases, apportionment is now the rule. *See* note 136 *infra*.

124 103 Eng. Rep. 926 (K.B. 1809).

125 There has been much speculation as to why the rule was so readily adopted. *See* Bohlen, *Contributory Negligence*, 21 HARV. L. REV. 233 (1908). *See also* Maloney, *From*

obstruction which has been made by the fault of another, and avail himself of it, if he do[es] not himself use common and ordinary caution to be in the right."[126]

The contributory negligence rule was universally adopted in American jurisdictions.[127] The doctrine took hold during a time of industrial development and was consistent with the laissez-faire economic and political philosophy which characterized the period. Accompanying this industrial growth was a concomitant increase in the number and magnitude of accidents suffered by employees and the general population.[128] The rule, it is said, developed as a check on sympathetic juries, whose verdicts could have had potentially crippling effects on infant industries, a result which would have been in direct contravention to the social policy of encouraging free economic growth.[129]

The harshness of absolute application of the contributory negligence rule gave rise to exceptions.[130] One of these exceptions is the

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Contributory to Comparative Negligence: A Needed Law Reform, 11 U. FLA. L. REV. 135, 141 (1958) [hereinafter *From Contributory to Comparative Negligence*], wherein it is stated: "One wonders whether the case might have been decided differently if the proportion of fault of the plaintiff had not been so great."

126 103 Eng. Rep. at 927. *Cf.* Flower v. Adam, 127 Eng. Rep. 1098 (C.P. 1810); Clay v. Wood, 170 Eng. Rep. 732 (N.P. 1803); Cruden v. Fentham, 170 Eng. Rep. 496 (N.P. 1798).

127 *E.g.*, Smith v. Smith, 19 Mass. (2 Pick.) 621 (1824) (the pioneer case in the universal adoption of the contributory negligence rule in the United States). The *Smith* court, citing *Butterfield*, stated that the plaintiff was required to show that he exercised ordinary care in order to recover. For early New York cases recognizing the contributory negligence rule, see Burdick v. Worrall, 4 Barb. 596 (N.Y. 1848); Brownell v. Flagler, 5 Hill 282 (N.Y. 1843); Burckle v. New York Dry Dock Co., 2 N.Y. Super. 170 (1829). In New York, one of the first jurisdictions to decide numerous railroad injury cases, the rule took hold during the 1850's. For a history of the development of the contributory negligence rule in New York, see Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. 151 (1946).

128 The accidents of an earlier day had been pretty much occurrences between neighbor and neighbor. As the nineteenth century progressed they became increasingly the casualties of the newer system.
2 HARPER & JAMES 1197.

129 *See* SELECTED TOPICS 6; *From Contributory to Comparative Negligence*, *supra* note 125, at 143; Turk, *Comparative Negligence on the March*, 28 CHI.-KENT L. REV. 189, 201 (1950).

130 It has, in fact, been called the "harshest doctrine known to the common law of the nineteenth century," because it "throws the entire loss on the injured party, however slight his negligent conduct, and at the same time relieves the negligent defendant altogether, however much he may have contributed to the injury." Green, *Illinois Negligence Law*, 39 ILL. L. REV. 36 (1944). The plaintiff's contributory negligence bars his recovery from a negligent defendant. Generally, contributory negligence will not bar a plaintiff's recovery if the defendant's wrongdoing was intentional; if the defendant's misconduct was wilful, wanton, or reckless; if the defendant violated a statute designed to protect a class of persons of which the plaintiff is a member; or if the defendant was engaged in an ultrahazardous activity. *See* 2 HARPER & JAMES 1211, 1213, 1216, 1227; PROSSER 425-26.

"Last Clear Chance" doctrine,[131] which was first applied in *Davies v. Mann*.[132] The doctrine recognizes the right of a negligent plaintiff who is in "helpless peril" to recover against another who knows of his peril and is able to avoid the injury, but fails to do so. Its application in many jurisdictions allows plaintiffs complete recovery, although apportionment between the parties would often be more appropriate.[133] Although still limited in some jurisdictions to instances of "helpless" and "discovered" peril, most American courts allow recovery where the plaintiff is "negligently inattentive" if the defendant discovers the danger.[134] This doctrine has been criticized as perpetuating the same inequity inherent in the contributory negligence rule, *i.e.*, placing the entire loss on one party where two have been negligent.[135]

A second exception to the contributory negligence rule was created by the enactment of the Federal Employers' Liability Act[136] in 1908. The Act provides for compensation in all negligence actions by railroad workers engaged in interstate commerce regardless of their contributory negligence. Damages are diminished in proportion to the employee's negligence. Similar results have obtained on the state level with the

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131 For extensive analysis of the "Last Clear Chance" doctrine, see Lowndes, *Contributory Negligence*, 22 GEO. L.J. 674, 700-08 (1934); James, *Last Clear Chance: A Transitional Doctrine*, 47 YALE L.J. 704 (1938); MacIntyre, *The Rationale of Last Clear Chance*, 53 HARV. L. REV. 1225 (1940). In New York, the doctrine was explicitly recognized in Kenyon v. New York Cent. & H.R.R.R., 5 Hun 479 (N.Y. 1875). For a history of the doctrine in New York, see Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. 151, 177-79 (1946).

132 152 Eng. Rep. 588 (Ex. 1842). The court did not specifically enunciate the "Last Clear Chance" doctrine, but spoke rather in terms of proximate cause. Attempts to justify its existence on causation grounds have been criticized. *See* PROSSER 427.

133 *See* Bohlen at 557.

134 *From Contributory to Comparative Negligence* at 146.

135 *See* SELECTED TOPICS 14-15; *From Contributory to Comparative Negligence* at 147; Comment, *Illinois Appellate Court Adopts Comparative Negligence Doctrine*, 43 NOTRE DAME LAW. 422, 424 (1968).

136 45 U.S.C. § 53 (1970). The Act, in part, states:

> [T]he fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. . . .

The Jones Act of 1920, 46 U.S.C. § 688 (1970), incorporated by reference the apportionment provisions of the Federal Employers' Liability Act. Thus, under the Jones Act, which is applicable to the negligence and wrongful death actions of maritime employees, contributory negligence is not a defense. *See* Carter v. Schooner Pilgrim, 238 F.2d 702 (1st Cir. 1956). The employee's damages are diminished in proportion to his negligence. *See* Antoine v. Lake Charles Stevedores, Inc., 376 F.2d 443 (5th Cir.), *cert. denied*, 389 U.S. 869 (1967). The Death on the High Seas Act of 1920, 46 U.S.C. §§ 761-68 (1970), applied the apportionment rule to the wrongful death actions of non-seamen. For further discussion of these maritime statutes, see M. NORRIS, THE LAW OF MARITIME PERSONAL INJURIES §§ 13, 134, 135 (2d ed. 1966).

In 1954, there were some forty statutes providing for apportionment of damages according to fault in "successful operation" in the United States. SELECTED TOPICS 4. The federal government and more than twenty-five states were involved.

enactment of Workmen's Compensation laws applicable to most industries.[137] The irony of this development is that it was industries, and especially the railroads, which were the principal beneficiaries of the contributory negligence rule at its inception, and the oft-cited reason for its adoption. The fact that it is no longer available in this context has prompted critics to call it an anachronism.[138]

The severity of the rule is often tempered by juries which engage in their own system of comparative negligence — the compromise verdict. In the face of clear-cut instructions to apply the contributory negligence rule, a jury will often allow a negligent plaintiff to recover some of his damages by apportioning them according to the degree of his contribution to the injury and finding no contributory negligence.[139] In the absence of a special verdict, which designates the proportion of guilt attributable to each of the parties,[140] the general verdict may camouflage this comparative fault approach,[141] the result being that "juries ignore the legal refinements of instructions and render verdicts based on their own opinions as to 'justice' in the particular case."[142] The practice of compromise verdicts for this reason has been called a corroding influence on attitudes about law and a "striking demonstration that [the contributory negligence rule] is out of keeping with the prevailing and easily discernible sense of justice" of the community.[143]

Not satisfied with the various ameliorations which have been engendered by the inequities of the contributory negligence rule, twelve states have adopted the comparative fault approach.[144] Two types of

137 *See, e.g.*, N.Y. WORKMEN'S COMP. LAW § 11 (McKinney 1965).

138 *See, e.g., Creative Continuity, supra* note 21, at 506-08; Comment, *Judicial Adoption of a Comparative Negligence Rule in Illinois*, 1967 ILL. L.F. 351, 353-54 [hereinafter *Comparative Negligence Rule in Illinois*]; Comment, *Illinois Appellate Court Adopts Comparative Negligence Doctrine*, 43 NOTRE DAME LAW. 422, 424 (1968).

139 *See Creative Continuity* at 503; Knoeller, *Review of the Wisconsin Comparative Negligence Act: Suggested Amendment*, 41 MARQ. L. REV. 397, 415 (1958); *From Contributory to Comparative Negligence* at 144-45. For a study of the attitude of jurors toward the contributory negligence rule, see Kalven, *Comment on* Maki v. Frelk, 21 VAND. L. REV. 897, 902-04 (1968).

140 A special verdict is employed by some states which have adopted a comparative fault approach in negligence. Under this method, the jury submits separate determinations as to the degree of the plaintiff's fault and the extent of his damages. The court then makes the apportionment. *See* Bouchard, *Apportionment of Damages Under Comparative Negligence*, 55 MASS. L.Q. 125, 129 (1970) [hereinafter *Apportionment*].

141 *See From Contributory to Comparative Negligence* at 171.

142 Powell, *Contributory Negligence: A Necessary Check on the American Jury*, 43 A.B.A.J. 1005, 1006 (1957).

143 *Creative Continuity* at 507. *See also Comparative Negligence Rule in Illinois, supra* note 138, at 355. "Approval of the covert violation of the present rule, in the interests of justice, suggests that perhaps the rule should be changed to conform to the practice." Averbach, *Comparative Negligence Legislation: A Cure for Our Congested Courts*, 19 ALBANY L. REV. 4, 11 (1955).

144 Arkansas, Georgia, Hawaii, Maine, Massachusetts, Minnesota, Mississippi, Ne-

apportionment under this system have been devised: "pure" and "modified." Under the pure form, the plaintiff's recovery is diminished according to the proportion of fault attributable to him. The modified approach permits proportional recovery by a negligent plaintiff only if his negligence is of a lesser degree than that of the defendant.[145] The modified form has been criticized as a "misfit in a system designed to distribute responsibility according to degrees of fault,"[146] and "in practical effect a combination of contributory and comparative negligence."[147]

One of the principal controversies surrounding proposals for the adoption of the comparative negligence approach involves its potential effect on the administration of the court system. Proponents of the change contend that it will produce: (1) faster settlements, because defendants would no longer be able to force dismissal on the ground of the plaintiff's contributory negligence, and (2) fewer jury trials, because most demands for juries in negligence actions are made to avoid the harshness of the contributory negligence rule.[148] Opponents argue that: (1) courts will be inundated with personal injury claims

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braska, New Hampshire, South Dakota, Tennessee, and Wisconsin have adopted comparative negligence. *See Apportionment, supra* note 140, at 144 n.4. For comprehensive discussions of the comparative negligence doctrine, see SELECTED TOPICS 1-69, *From Contributory to Comparative Negligence*; Mole & Wilson, *A Study of Comparative Negligence*, 17 CORNELL L.Q. 333, 604 (1932); Turk, *Comparative Negligence on the March*, 28 CHI.-KENT L. REV. 189, 304 (1950).

"The United States is virtually the last stronghold of contributory negligence." SELECTED TOPICS 3. England adopted comparative negligence by the Law Reform (Contributory Negligence) Act of 1945, 8 & 9 Geo. 6, c. 28. Contributory negligence is no longer a bar to the plaintiff's recovery; damages are apportioned as the court thinks just and equitable.

145 *See Apportionment* at 127. Under the "slight versus gross negligence" variation, damages are apportioned when the plaintiff's negligence is "slight," while the defendant's negligence is "gross." For discussion of the modified approach, see *From Contributory to Comparative Negligence* at 169.

146 Campbell, *Recent Developments of the Law of Negligence in Wisconsin*, 1956 WIS. L. REV. 4, 21. The inconsistency of the modified approach has been illustrated by this example: If the plaintiff is 40% negligent, he can recover 60% of his loss from a single defendant. However, if two defendants, equally negligent, are involved, he can recover from neither. Thus, the plaintiff's chance of recovery may depend upon the number of persons responsible for his injury. *See Comparative Negligence Rule in Illinois* at 358-59.

147 *Comparative Negligence Rule in Illinois* at 359.

148 *See, e.g.*, Averbach, *Comparative Negligence Legislation: A Cure for Our Congested Courts*, 19 ALBANY L. REV. 4, 11 (1955) ("England and Wisconsin have found that a decrease in litigation resulted."); Bress, *Comparative Negligence: Let Us Hearken to the Call of Progress*, 43 A.B.A.J. 127, 130, 149 (1957); Knoeller, *Review of the Wisconsin Comparative Negligence Act: Suggested Amendment*, 41 MARQ. L. REV. 397, 414 (1958). For a reaction to the first article, see Harkavy, *Comparative Negligence: The Reflections of a Skeptic*, 43 A.B.A.J. 1115 (1957). The author argues that the contributory negligence rule is necessary as a disciplinary sanction in light of ever-increasing accident tolls. *But see* Knoeller, *supra*, at 414.

by plaintiffs who under the present rule would have no hope of recovery, and (2) litigation will be substantially complicated by requiring juries to apportion.[149]

The conclusions of a survey[150] conducted to determine the overall impact of the Arkansas comparative negligence system may be helpful. The researchers found that the comparative negligence rule encouraged pretrial settlements and had no substantial effect on preference for jury trials, but that it increased potential litigation and made the damages issue more complex.[151]

The last statement by the New York Court of Appeals on the subject of contributory negligence reflects deep dissatisfaction with that doctrine. In 1971, in *Rossman v. LaGrega*,[152] the Court, again per Judge Bergan, took the opportunity to severely criticize the rule. The Court stated:

> The doctrine has, indeed, been long subjected to critical theoretical attack by commentators on the law of torts. Prosser has observed: "The history of the doctrine has been that of a chronic invalid who will not die." He concluded: "With the gradual change in social viewpoint, stressing the humanitarian desire to see injuries compensated, the defense of contributory negligence has gradually come to be looked upon with increasing disfavor by the courts, and its rigors have been quite extensively modified. . . ." The theories justifying application of the doctrine were regarded by Prosser as "the antique heritage of an older day. . . ."[153]

Significantly, the Court quoted with approval characterizations of contributory negligence as " 'the harshest doctrine known to the common law of the nineteenth century,' "[154] and a " 'thoroughly unjust and illogical' "[155] doctrine. It pointedly observed that continued acceptance of

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149 *See, e.g.*, Body, *Comparative Negligence: The Views of a Trial Lawyer*, 44 A.B.A.J. 346 (1958); LaBrum, *Congested Trial Calendars: It's About Time to Do Something About Them*, 43 A.B.A.J. 311, 314 (1957). The arguments are marshalled in Rosenberg, *Comparative Negligence in Arkansas: A "Before and After" Survey*, 13 ARK. L. REV. 89, 91-93 (1959).

150 Rosenberg, *Comparative Negligence in Arkansas: A "Before and After" Survey*, 13 ARK. L. REV. 89 (1959). Reports were obtained from judges and lawyers involved in negligence litigation in Arkansas before and after the adoption of comparative negligence.

151 *Id.* at 108. For further appraisal of the arguments, see *From Contributory to Comparative Negligence* at 160-74.

152 28 N.Y.2d 300, 270 N.E.2d 313, 321 N.Y.S.2d 588 (1971) (7-0).

153 *Id.* at 306, 270 N.E.2d at 316, 321 N.Y.S.2d at 593, *quoting* PROSSER, THE LAW OF TORTS 428 (3d ed. 1964).

154 *Id.* at 307, 270 N.E.2d at 316, 321 N.Y.S.2d at 594, *quoting* Green, *Illinois Negligence Law*, 39 ILL. L. REV. 36 (1944).

155 *Id.*, 270 N.E.2d at 317, 321 N.Y.S.2d at 594, *quoting* Lowndes, *Contributory Negligence*, 22 GEO. L.J. 674, 709 (1934).

> The doctrine of contributory negligence is not just. The defendant should not be made to bear the burden of the plaintiff's misconduct. Nor should he go scot-

the contributory negligence rule requires reconciliation to " 'inconsistent and irreconcilable cases.' "[156] In unanimously holding that the issue of the plaintiff's contributory negligence should not be decided as a matter of law, the Court concluded: "At least we ought not extend the perimeters of this unsatisfactory doctrine wider than we need to."[157]

This criticism of the contributory negligence rule by the Court of Appeals culminated in *Dole*, a further indication of judicial dissatisfaction with that archaic doctrine and a major step toward the adoption of full comparative negligence in New York. Importantly, one court has offered the following analysis:

> It is the opinion of this Court that the epic-making *Dole* decision is the first important step toward the judicial re-evaluation and revision of the hard and fast rule of law which precludes a plaintiff who is guilty of any negligence from recovering damages for his injuries. True comparative negligence which determines plaintiff's recovery by a qualitative and quantitative measure of responsibility, a procedure valid in many states of the Union, is the most equitable method of determining the rights of the parties in a negligence cause of action. It is readily apparent from a study of the opinion of the Court in the *Dole* case that an extension of this philosophy in favor of a plaintiff who to some degree is guilty of negligence would not bar his right of recovery.[158]

Since contributory negligence is a judicially-created doctrine,[159] the Court of Appeals need not wait for the Legislature to act: it may adopt a comparative fault system on its own initiative.[160]

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free. In an ideal system the defendant would be compelled to shoulder that part of the loss which was due to his negligence. The plaintiff would bear that portion which was referable to his own misconduct.

Lowndes, *supra*, at 708.

156 28 N.Y.2d at 308, 270 N.E.2d at 317, 321 N.Y.S.2d at 595, *quoting* 34 N.C.L. REV. 137, 141 (1955).

157 *Id.*, 270 N.E.2d at 317, 321 N.Y.S.2d at 595.

158 Yarish v. Dowling, 70 Misc. 2d 467, 469, 333 N.Y.S.2d 508, 511 (Sup. Ct. Queens County 1972) (mem.). "[A]nalysis of *Dole* and *Kelly* suggests that a view of contributory negligence which makes it an absolute bar to a plaintiff's recovery cannot survive." Sorrentino v. United States, 344 F. Supp. 1308, 1310 (E.D.N.Y. 1972).

159 The contributory negligence rule has found its way into New York statutes (N. Y. EST., POWERS & TRUSTS LAW §§ 5-4.2 & 11-3.2 (McKinney 1967)), but these statutes may fairly be interpreted as legislative recognition of the rule rather than legislative mandate for its continued application.

160 *See* Loui v. Oakley, 50 Hawaii 260, 265 n.5, 438 P.2d 393, 397 n.5 (1968); Maki v. Frelk, 85 Ill. App. 2d 439, 229 N.E.2d 284 (1967), *rev'd*, 40 Ill. 2d 193, 239 N.E.2d 445 (1968). *Cf.* Silver v. Great Am. Ins. Co., 29 N.Y.2d 356, 278 N.E.2d 619, 328 N.Y.S.2d 398 (1972), *noted in* 46 ST. JOHN'S L. REV. 588 (1972) (liberalizing the *forum non conveniens* doctrine); Gelbman v. Gelbman, 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S.2d 529 (1969) (modifying the intrafamily immunity doctrine); Bing v. Thunig, 2 N.Y.2d 656, 143 N.E.2d 3, 163 N.Y.S.2d 3 (1957) (abolishing the charitable immunity doctrine). *But see* Bissen v. Fujii, 51 Hawaii 636, 466 P.2d 429 (1970); Peterson v. Culp, 255 Ore. 269, 465 P.2d 876 (1970); Vincent v. Pabst Brewing Co., 47 Wis. 2d 120, 177 N.W.2d 513 (1970). Favorable

The revolution that is *Dole* is part of a pattern of judicial activity aimed at the elimination of archaic common-law rules developed in olden times and applied too strictly and for too long. Many of these doctrines — *e.g.*, the charitable immunity rule, the intrafamily immunity rule, the active-passive dichotomy, and, particularly, the contributory negligence rule — have had the effect of preventing recovery and recovery over from wrongdoers who had been able to invoke a kind of talismanic immunity from liability. Thus, the Court has liberalized the bases for recovery and further fused responsibility with fault. Only the contributory negligence rule remains to be abrogated.

The reasonableness of an apportionment system propels us toward a comparative negligence rule, but the likelihood that it will aggravate the acute problem of court congestion acts as a restraint. Legislative adoption of a no-fault automobile insurance plan — increasingly likely — would reduce court congestion and create an atmosphere more conducive to the adoption of a comparative negligence system. In a state moving toward such a no-fault system, the equitable comparative negligence rule should certainly prevail.

Conclusion

Dole v. Dow Chemical Co. creates a system of comparative negligence among defendants, a system which is realistic and fair. The

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commentary on the issue includes PROSSER 434; *Creative Continuity*; *Comparative Negligence Rule in Illinois* at 356-57. For a symposium on whether the change to a rule of comparative negligence should be made by the judiciary or the legislature, see 21 VAND. L. REV. 889 *et seq.*

> Some courts have adopted a form of comparative negligence. The leading example is Tennessee with its judicially created doctrine of remote contributory negligence. . . . The essential difference between the Tennessee rule and ordinary comparative negligence is that in the latter, damages are mitigated or diminished in accordance with the relative degrees of negligence of the parties, while in the former, they are diminished in accordance with the relative closeness of the causal connection. . . .
>
> Georgia's comparative negligence . . . statute grew out of language in the opinions of previous decisions of the Georgia Supreme Court. . . .
>
> Finally, the various recognized exceptions — such as that of intentional, wilful, and wanton, or gross misconduct, and especially that of last clear chance — were all judicially created.

Wade, *Comment on* Maki v. Frelk, 21 VAND. L. REV. 938-40 (1968). Georgia's codified judicial rule was "subsequently judicially broadened into a general apportionment rule." *Comparative Negligence Rule in Illinois* at 353 n.17. Georgia courts broadly interpreted a statute, GA. CODE ANN. § 94-703 (1972), providing for apportionment in railroad negligence actions.

There appears to be no compelling reason why the contributory negligence rule could not be judicially abrogated. In 1968, Professor Robert Keeton concluded:

> [In the last ten years], [m]ore than half of the state courts of last resort have contributed to a total of more than ninety overruling decisions on more than thirty separate rules of tort law. It is becoming an accepted principle that courts should take a more active role in reforming outmoded tort law. . . .

Keeton, *Comment on* Maki v. Frelk, 21 VAND. L. REV. 906, 914-15 (1968).

"[r]ight to apportionment of liability or to full indemnity, . . . as among parties involved together in causing damage by negligence, [is to] rest on relative responsibility and [is] to be determined on the facts."[161] *Dole* eliminates the active-passive test for indemnification and supersedes in part the contribution statute, CPLR 1401. A *Dole* claim can be made by impleader, cross-claim, counterclaim, or separate indemnity action. In the interest of economical judicial administration, damages should be apportioned among all participants in a single action. A *Dole* claim is available in the negligence and breach of warranty areas and apparently in the strict liability area. Additionally, it may even be extended to intentional torts. *Dole* will probably be retroactive. Most significantly, *Dole* signals deep dissatisfaction with the Draconian contributory negligence rule and moves New York inexorably toward the adoption of full comparative negligence.

[161] Dole v. Dow Chem. Co., 30 N.Y.2d 143, 153, 282 N.E.2d 288, 295, 331 N.Y.S.2d 382, 391-92 (1972).